

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**





ORIGINAL

**76-7438**

IN THE  
**United States Court of Appeals**  
**For the Second Circuit**

**No. 76-7438**

FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank,  
*Plaintiff-Appellee,*  
*against*  
JEAN M. GRELLA, LAWRENCE LEVER, and  
LEVER HOLDING CORP.  
*Defendants,*  
JEAN M. GRELLA,  
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

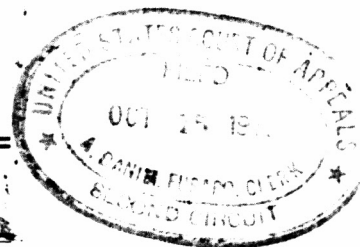
**JOINT APPENDIX**

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P/S



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JOINT APPENDIX

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**DOCKET ENTRIES**

75C		276		207		1		75		0276		02		21		75		1		430		APPEAL		JUNCTION		0716		JURY DEM.		PLIT	
PLAINTIFFS										DEFENDANTS																					

FDIC

FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver for Franklin National  
Bank

GRELLA, JEAN M. ET AL.

JEAN M. GRELLA, LAWRENCE LEVER  
and ~~JEAN M. GRELLA, LAWRENCE LEVER~~  
~~and LEVER HOLDING CORP.~~  
and LEVER HOLDING CORP.

CAUSE  
12 USC 1819, 28 USC 1331, 1345, 1348--TO CONTINUE LEASE IN FULL FORCE  
BETWEEN FRANKLIN NAT'L. AS LESSEE & GRELLA AS LESSOR.  
SEEKS: Declaratory Judgment & Injunction.

RELATES: 74 C 1434

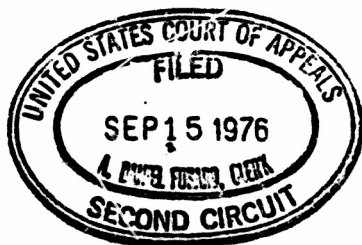
FOR PLTFF:  
Hughes, Hubbard & Reed  
One Wall Street  
New York, N.Y. 10005  
943-6500

ATTORNEYS FOR GRELLA:  
Robert P. Lynn, Jr.

FOR LEVER:  
Louis Diamond of Wolff & Diamond  
100 Garden City Place  
Garden City, N.Y. 11530  
742-2440

FOR RELIANCE FEDERAL, INC.:  
Richard Walfeld  
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Garden City, N.Y. 11530  
516-741-5530

FOR J. GRELLA: SPRAGUE, DWIER, ASP-  
LAND & TOBIN  
220 Old Country Rd.  
Mineola, N.Y. 11501  
516-746-5700



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	DATE	RECEIPT NUMBER	C.O. NUMBER	CARD	DATE FILED
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BBIC v. JEAN M. GRELLA, ET AL.

DATE	NR.	PROCEEDINGS	
02-21-75		Complaint filed. Summons issued.	(1)
02-21-75		Clerk's order allowing for personal service of summons and complaint filed.	(2)
2-24-75		Summons ret and filed/executed.	(3)
2-24-75		Affidavit of Service filed.	(4)
2-24-75		Memorandum in support of temporary restraining order and preliminary injunction filed.	(5)
2-25-75		By JUDD, J.-Order to Show Cause dtd 2-21-75 returnable 2-27-75 re preliminary injunction and to enjoin deft Grella etc from terminating the lease entered into on 4-4-61 etc filed.	(6)
2/28/75		By JUDD, J.- Order dated 2/27/75 filed that on consent of all parties the hearing for a preliminary injunction in the above entitled action scheduled for 2/27/75 is adjd to 3/6/75, etc.	(7)
2/23/75		By JUDD, J.- Order dated 2/27/75 filed that plttf be granted leave to issued and serve a Notice of Examination, etc.	(8)
2/28/75		Notice of Examination filed.	(9)
3/4/75		Before JUDD, J.- Case called- Both sides present-Hearing begun on plttf's motion for preliminary injunction-Both sides rest-Hearing concluded-Plttf's motion for prel. injunction and for temporary restraining order granted-Plttf's to submit order-Deft's motion to dismiss for lack of standing-Argued-Motion denied.	
3/5/75		Notice of Cross Motion , ret. 3/4/75 filed re: to dismiss the complaint, etc.	(10)
3/5/75		Memorandum in Opposition to application for an injunction Pendente Lite, and in Support of Cross Motion to dismiss filed.	(11)
3-5-75		Deposition of Jean M. Grella, dtd 3-4-75 filed.	(12)
3-5-75		Stenographer's transcript dtd 3-4-75 filed.	(13)
3-13-75		Notice of settlement filed.	(14)
3-13-75		By JUDD, J.-Preliminary injunction dtd 3-13-75 re enjoining defts from taking any further steps on the Ground Lease on the basis that on Oct. 8, 1974 th Comptroller decthecurrency of the U.S. declared that FNB was insolvent and appointed the FDIC as Receiver of FNB, etc. See Papers. (p/c mailed) See doc. #144-	
3-13-75		Objections to proposed findings and order submitted by plttf filed.	(15)
3/17/75		Answer of deft Reliance Federal Savings and Loan Assoc. of New York filed.	(16)
3-25-75		Answer and cross-claims of deft Lawrence Lever filed.	(17)
3-25-75		Notice of appearance of Lawrence Lever filed.	(18)
3-1-75		Affidavit of service of notice of settlement filed.	(19)
4-2-75		Memorandum in support of plttf's counter proposed order filed.	(20)
4-2-75		By JUDD, J. - Order dtd 4-2-75 denying deft Grella's motion to dismiss complaint or for preliminary injunction filed.	(21)
4-7-75		(p/c mailed to attys).	
4-9-75		Notice of entry filed.	(22)
4-9-75		Notice of appeal filed. Copy sent to C of A. JN.	(23)
4/14/75		Answer of deft Jean M. Grella filed.	(24)
5-5-75		Copy of letter dtd 5-1-75 to Gerald B. Wald from Robert Lynn filed.	(25)
5/9/75		ANSWER of Cross-Claims filed (of J. Grella to cross-claims of deft Reliance Fed.	(26)
5/9/75		ANSWER of Cross Claims filed (of J. Grella to cross-claims of	B

75C - 276

## CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. 75C 276
FEDERAL DEPOSIT INSURANCE COMPANY		JEAN W. GRELLA, et al	PAGE ____ OF ____ PAGES
DATE	NR.	PROCEEDINGS	
5-9-75		Above record on appeal certified and mailed to the Court of Appeals.	
5-16-75		Acknowledgment rec'd and filed from the VC of A for receipt of file.	
5-30-75		Certified copy of order rec'd from C of A & filed. Ordered that the appeal from the order of the district court is dismissed.	
11-12-75		By JUDD, J.-Order dtd 11-11-75 that Lever Holding Corp. is added as a party deft in place of Reliance Federal Savings and Loan Assoc; etc. See order. <i>J/CN/MS</i>	
2-4-76		Notice of motion by plttf. ret. 2-13-75 with memo of law re: for summary judgment filed.	
2-6-76		Memorandum on behalf of defts Lever and Lever Holding Co. filed.	
2/13/76		Before JUDD, J.- Case called- Adj'd to 2/27/76	
2-17-76		By JUDD, J.- Order dtd. 2-16-76 adj motion for summary judgment to 2-27-76 filed.	
2-23-76		Affadavit in oppositio n to plttf. motion for summary judgment with memo of law in support filed.	
2-25-76		Defts. supplemental affadavit in opposition to motion for summary judgment filed.	
2-27-76		Before JUDD, J. - Case called & adj'd to 3-5-76 at 10 A.M.	
3-3-76		Affidavit of Lawrence Lever with memo of law re: for summary judgment- filed.	
3-5-76		Before JUDD, J.- Case called. PLttf, motion for summary judgment argued. Decision reserved	
3-8-76		By JUDD, J.- Order dtd. 3-5-76 adjd plttf's motion ofr summary judgment to 3-5-76 filed.	
6-16-76		Before JUDD, J. - Case called. Both sides present. Decision of Court on plttf's motion for summary judgment read into record. Plttf's motion for summary judgment granted. Order to be submitted.	
6-25-76		Sten. transcript dtd. 6-16-76 filed.	
7-6-76		By JUDD, J.- Order dtd. 7-2-76 of final judgment without costs etc., in favor of plttf filed.	
8-31-76		Notice of appeal of deft Grella filed.	
9-9-76		Civil appeal scheduling order filed.	
9-15-76		Above record certified and hand delivered to the Court of Appeals.	

A TRUE COPY  
 ATTEST  
 DATED September 5, 76  
 LEWIS ORGEL  
 BY Mary Anne Smith CLERK  
 DEPUTY CLERK

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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----- x  
FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver Of Franklin National Bank, :

Plaintiff, :

(O.G.J.)  
75 C. 276

-against-

JEAN M. GRELLA, LAWRENCE LEVER and :  
RELIANCE FEDERAL SAVINGS AND LOAN :  
ASSOCIATION OF NEW YORK, :

Defendants. :  
----- x

COMPLAINT

Plaintiff Federal Deposit Insurance Corporation  
("FDIC"), by its attorneys, Hughes Hubbard & Reed, for its  
complaint herein alleges:

1. Plaintiff FDIC is an agency of the United States  
Government organized and existing under and by virtue of an act  
of Congress (12 U.S.C. §§ 1811-1831), and is expressly author-  
ized by Congress to sue (12 U.S.C. § 1819). On October 8, 1974,  
pursuant to 12 U.S.C. §§ 191 and 1821(c), FDIC was appointed  
receiver of Franklin National Bank ("FNB") by the Comptroller  
of the Currency of the United States. As receiver of FNB ("Re-  
ceiver"), FDIC has exclusive dominion and control of FNB's  
assets.

2. On information and belief, defendant Jean M.  
Grella ("Grella") is a resident of Nassau County, New York State.

3. On information and belief, defendant Lawrence  
Lever ("Lever") is a resident of Nassau County, New York State.  
Lever has been made a nominal defendant since he has an interest  
in the subject matter of this action.

4. On information and belief, Reliance Federal Savings and Loan Association of New York ("Reliance") is a savings and loan association organized under the laws of the United States of America, with its principal offices at 89-61 162nd Street, Jamaica, New York; Reliance is successor in interest to Queens County Federal Savings and Loan Association ("Queens S&L"). Reliance has been made a nominal defendant since it has an interest in the subject matter of this action.

5. The controversy arises under the laws of the United States, specifically, 12 U.S.C. §§ 1819 and 1821(c). The amount in controversy herein exceeds the sum of Ten Thousand Dollars (\$10,000), exclusive of interest and costs. The Court has jurisdiction over the subject matter of this action by virtue of 12 U.S.C. § 1819 and 28 U.S.C. §§ 1331, 1345 and 1348.

6. On information and belief, as of April 4, 1961, Grella was the owner of the fee interest in certain unimproved land in Mineola, L.I., located on the north side of Old Country Road between Willis Avenue and Roslyn Road (hereinafter the "Ground"). On or about April 4, 1961, Grella and FNB, then known as Franklin National Bank of Long Island, entered into an agreement, a copy of which is attached hereto as Exhibit A, pursuant to which Grella leased the Ground to FNB for a term to expire on February 28, 1981, with four options to renew for twenty years each (hereinafter "Ground Lease").

7. On information and belief, on or about November 1, 1962, FNB agreed with Lever to sublease the Ground to Lever, who was to construct an office building thereon; Lever agreed to sublease space in said building to FNB for a branch office.

8. On information and belief, in order to build an office building of six stories on the Ground, Lever applied

for a zoning variance, Grella joined with Lever in the application, and the variance was granted.

9. On information and belief, on December 9, 1963 Lever assigned his contract with FNB to Mineola Office Building, Inc. ("MOB"), a corporation in which he was the sole stockholder. FNB then subleased the Ground to MOB, and MOB subleased to FNB branch office space in the building to be constructed on the Ground. On information and belief, construction of the office building ("Lever's Building") was completed in 1965, and FNB thereafter commenced to occupy the branch office space subleased to it.

10. On information and belief, on or about December 28, 1964, FNB and MOB agreed that MOB would surrender its sublease of the Ground to FNB, that FNB would assign the Ground Lease to MOB, and that MOB's sublease of the branch office space to FNB would continue. The assignment of the Ground Lease by FNB to MOB was duly recorded in the office of the County Clerk for Nassau County.

11. On information and belief, on or about January 7, 1965, MOB assigned the Ground lease to Woodmere Knolls, Inc. ("Woodmere"), a corporation in which Lever was the sole stockholder. On information and belief, Woodmere assigned the Ground Lease to Queens S&L, the predecessor in interest of defendant Reliance, as collateral for certain loans. Each of said assignments was duly recorded in the office of the County Clerk for Nassau County.

12. On information and belief, by communication dated January 7, 1965, Woodmere:

(a) gave notice to Grella of the assignment of the Ground Lease to MOB, of MOB's assignment of the Ground Lease to Woodmere, and of Woodmere's



assignment of the Ground Lease to Queens S&L;

(b) gave notice to Grella that communications and notices should be addressed directly to Queens S&L at 89-61 162nd Street, Jamaica, New York; and

(c) delivered to Grella a signed declaration that Woodmere was exercising its first two renewal options as Tenant under Paragraph 17 of the Ground Lease, thereby extending the term of the Ground Lease to February 28, 2021.

13. On information and belief, on August 27, 1965, Woodmere assigned the Ground Lease to Lever, subject to the assignment to Queens S&L; said assignment to Lever was duly recorded in the office of the County Clerk for Nassau County.

14. On information and belief, FNB and/or its assignee and/or subsequent assignees of the Ground Lease have at all times complied with the terms, covenants and conditions contained in the Ground Lease, and all items of rent referred to in the Ground Lease have been timely paid in full.

*[Handwritten signature]*  
15. On October 8, 1974, the Comptroller of the Currency of the United States declared FNB insolvent and, pursuant to 12 U.S.C. §§ 191 and 1821(c), appointed FDIC receiver of FNB. As Receiver, FDIC entered into a Purchase and Assumption Agreement pursuant to which it sold certain of FNB's assets and transferred certain of FNB's liabilities to European-American Bank & Trust Company ("EAB"), a New York bank and trust company. This transaction was approved by the United States District Court for the Eastern District of New York in an order signed by Judge Orrin Judd dated October 8, 1974.

~~6-11-75~~

16. Immediately after approval of the transaction referred to in paragraph 15, EAB entered into the leased branch office premises in Lever's Building as licensee of the Receiver. Since October 8, 1974 EAB has been providing to FNB depositors and to the community the banking services that had previously been provided by FNB.

17. EAB has advised the Receiver that it desires to take an assignment of FNB's sublease on the branch office space in Lever's Building and, in accordance with the Purchase and Assumption Agreement, to buy from the Receiver at appraised value certain improvements and personalty located in the branch office space. Lever, who on information and belief is the owner of the Building and the lessor of FNB's branch office space, has indicated that he will consent to the proposed assignment by the Receiver to EAB.

18. Since October 8, 1974, Receiver has made payments to Lever with respect to the subleased branch office space occupied by EAB. On information and belief, Lever has continued to make rent payments to Grella under the Ground Lease; in January 1975 Lever paid Grella in advance, and Grella accepted, the annual rent of \$21,000 due under the Ground Lease on March 1, 1975. for the year beginning March 1, 1975.

~~6-11-75~~

19. On information and belief, on or about February 3, 1975, Grella served notice on FNB, in care of FDIC as Receiver, and on MOB, Woodmere, Reliance and Lever, purporting to terminate the Ground Lease as of February 11, 1975, claiming that the insolvency of FNB declared on October 8, 1974 constituted a default under Paragraph 10 of the Ground Lease. A copy of said notice is attached hereto as Exhibit B.

20. Grella's notice of termination was wrongful because none of the events or conditions set forth in Paragraph

~~6-11-75~~

10 of the Ground Lease has occurred.

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21. If Grella's purported termination of the Ground Lease is permitted to become effective, plaintiff will suffer grave, immediate and irreparable injury for which there is no adequate remedy at law, in that, among other things:

(a) FDIC's ability to protect the public interest by having solvent banking institutions purchase assets and assume liabilities of insolvent banks and continue providing services to depositors and other members of the community will be seriously jeopardized, since it is unlikely that sound banking institutions will enter into such transactions if there is no reliable expectation that the purchasing bank will be able to enjoy possession and occupancy of branch offices without unwarranted interference;

(b) FDIC's capacity to limit the drain on its financial resources by having solvent banking institutions purchase assets and assume liabilities of insolvent banks will be seriously impaired if there is a substantial risk that the purchasing bank will be unable to enjoy possession and occupancy of branch offices without unwarranted interference;

(c) On information and belief, Grella will re-enter and repossess the Ground and Lever's Building and will

(i) interfere with and disrupt EAB's service to former depositors of FNB, to its own depositors, and to other users of its banking services,

(ii) impair FDIC's right to assign the sublease of the branch office space to



EAB, thus jeopardizing EAB's ability to continue providing services to its depositors and other customers and to be a viable Long Island banking institution, and

(iii) impair FDIC's right to sell to EAB certain improvements and personalty located in the branch office;

(d) Permanent improvements to the branch office space which cannot be removed will be forfeited to Grella.

22. If Grella is permitted to effect a termination of the Ground Lease, the six-story office building that was constructed on the Ground in reliance upon the right to renew the Ground Lease through February 28, 2061 will be forfeited to Grella.

23. Grella has waived any right she may have had to terminate the Ground Lease and is estopped from asserting any such right, in that, among other things she:

(a) joined with Lever in obtaining a zoning variance to permit Lever to construct a building on the Ground;

(b) permitted Lever or his affiliates to construct the building on the Ground;

(c) accepted rent from Lever or his affiliates for a period of more than ten years;

(d) accepted the exercise of two renewal options under the Ground Lease by an affiliate of Lever;

A 7

(e) did not object when EAB entered into the leased branch office premises as licensee of the Receiver, although, on information and belief, she was aware that FNB had been declared insolvent on October 8, 1974; and

(f) accepted Lever's prepayment in January, 1975 of the 1975 annual rental under the Ground Lease for the 12-month period commencing March 1, 1975, although, on information and belief, she was aware that FNB had been declared insolvent on October 8, 1974.

WHEREFORE, Plaintiff demands that it have judgment...  
against Grella; --

(a) declaring that Grella's notice of termination of the Ground Lease is null and void and of no force or effect whatever;

(b) declaring that the Ground Lease continues in full force and effect;

(c) preliminarily and permanently enjoining Grella, her agents, servants, employees, attorneys, all persons under their control, direction, permission, or license, and all persons in active concert or participation with them or any of them, from

(i) terminating the Ground Lease on the basis of the declaration by the Comptroller of the Currency of the United States

that FNB was insolvent and the ap-  
pointment of FDIC as Receiver of FNB  
pursuant to 12 U.S.C. §§ 191 and 1821(c);

A - 8

(ii) reentering the leased prem-  
ises and repossessing the Ground and  
Lever's Building by any means, including  
summary proceedings or force, so long  
as the Ground Lease is in effect;

(iii) taking any action incon-  
sistent with the rights of FNB and  
its assignees under the Ground Lease;

(iv) interfering in any way with  
plaintiff's assignment of FNB's lease  
of the branch office space to EAB;

(f) for the costs and disbursements of  
this action; and

(g) for such other, further and different  
relief as to the Court may deem just and proper.

Dated: New York, New York  
February 21, 1975

HUGHES HUBBARD & REED

By S/ Amalia Kearse  
A Member of the Firm  
Attorneys for Plaintiff Federal  
Deposit Insurance Corporation  
One Wall Street  
New York, New York 10005  
(212) WH 3-6500

**Exhibit A Annexed to Complaint**

**(Agreement of Lease dated April 4, 1961 between Jean M.  
Grella and The Franklin National Bank of Long Island)**

A 9

THIS AGREEMENT OF LEASE, dated the 14<sup>th</sup> day of April, 1961, between JEAN M. GRELLA, residing at No. 10 Fair Court, Garden City, New York (hereinafter designated as the "Landlord"), and THE FRANKLIN NATIONAL BANK OF LONG ISLAND, a national banking corporation, with an office at No. 925 Hempstead Turnpike, Franklin Square, New York (hereinafter designated as the "Tenant");

W I T N E S S E T H   T H A T :

The Landlord hereby leases to the Tenant the parcel of land known as Lots 4, 5, 6, 7, 14, 15, 16 and 17, in Block 350, on the Land and Tax Map of Nassau County, being a parcel on the north side of Old Country Road, at Mineola, between Willis Avenue and Roslyn Road, and having a frontage on Old Country Road of approximately 200 feet and extending northerly approximately 200 feet to the south side of Third Street, for a term of twenty (20) years commencing on March 1, 1961 and to end on the twenty-eighth day of February 1981, upon the conditions and covenants following:

1. The Tenant shall pay the rent of ELEVEN THOUSAND THREE HUNDRED FIFTY (\$11,350.00) DOLLARS for the period of March 1, 1961 to February 23, 1962 and thereafter the annual rent of TWENTY-ONE THOUSAND (\$21,000.00) DOLLARS, payable in advance on the first day of March, 1962 and annually thereafter.

2. The Tenant shall take good care of the premises and shall, at the Tenant's own cost and expense, make all repairs, structural or otherwise, and at the end or other expiration of the term, shall deliver up the demised premises in good order or condition, damages by the elements and ordinary wear and tear excepted, it being understood that the Landlord is not required to furnish or supply any services or make any payments, expressly or implied, and the Tenant shall operate and maintain the said premises as its own, paying all costs of construction, repairs, maintenance, demolition, etc., and paying to the Landlord annually and without offset or deduction the net rent set forth herein, together with any additional rent herein provided for.

3. That the Tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and local governments and of, any and all their Departments and Bureaus applicable to said premises during said term; and shall also promptly comply with and execute all rules, orders and regulations of the New York Board of Fire Underwriters, or any other similar body, at the Tenant's own cost and expense.

4. The Tenant shall have the right to assign, sublet or under-lease the said premises, or any part thereof, to make any alterations or repairs to the said premises and shall have the right to erect, construct, remodel or demolish any building now or hereafter constructed thereon, all without the Landlord's consent, but the Tenant will not occupy, nor permit or suffer the same to be occupied, for any business or purpose deemed disreputable or extra hazardous on account of fire, and shall demolish no building in the last three years of this lease without the Landlord's consent unless it has exercised its option to renew.

5. The Tenant will maintain liability insurance in amounts of at least \$250,000/1,000,000. coverage and will maintain fire and plate glass insurance on the demised premises in the face amounts equal to at least full replacement costs, and shall pay the cost of all premiums thereof, and upon failure of the Tenant to provide the same the Landlord may on ten (10) days notice procure such insurance and pay the cost thereof charging the same as additional rent to be paid by the Tenant on the first of the following month. All such policies shall insure both the Landlord and the Tenant as their interest may appear.

6. In case of damage to, or destruction of, any buildings on the leased premises by fire or other casualty, prior to the last three years of the original or any renewal term, the Tenant shall have the option to restore or rebuild the same to at least the quality and condition in which they were immediately prior to such damage or destruction, or to demolish the same, but shall be entitled to the proceeds of any insurance policies paid in adjustment of the loss caused by such casualty. If the destruction or damage occurs

during the last three years of the original term or any renewal term, and the Tenant elects not to rebuild or restore the structures, the proceeds of any insurance policies paid in adjustment of the loss caused by such casualty shall be divided into 36 parts, and the Tenant shall be entitled to as many of such parts as calendar months or parts of months remain of the then current term, and the Landlord shall be entitled to the balance, unless the Tenant at the same time it elects not to rebuild or restore, also elects to renew the lease for an additional term, and so notifies the Landlord in writing, in which event the entire proceeds of such policies shall be payable to the Tenant. No such damage or destruction shall affect the obligation of the Tenant to pay the net rent and additional rent provided herein, or any other covenant or obligation of the Tenant hereunder, for the remainder of the term.

7. The Landlord is exempt and shall be indemnified by the Tenant from any and all liability for any damage or injury to person or property or from any damage or injury resulting or arising from any cause or happening whatsoever unless said damage or injury be caused by or be due to the active negligence of the Landlord.

8. If any default be made in the payment of rent for fifteen (15) days after notice the Landlord, or her representatives, may re-enter by force, summary proceedings or otherwise, and remove all persons therefrom, without being liable to prosecution therefor, and the Tenant hereby expressly waives the service of any notice in writing of intention to re-enter, and the Tenant shall pay at the same time as the rent becomes payable under the terms hereof a sum equivalent to the rent reserved herein, and the Landlord may rent the premises on behalf of the Tenant, reserving the right to rent the premises for a longer period of time than fixed in the original lease without releasing the original Tenant from any liability, applying any moneys collected, first to the expense of resuming or obtaining possession, second to restoring the premises to a rentable condition, and then to the payment of the rent and all other charges due and to grow due to the Landlord, any surplus during the term of this lease to be paid to the Tenant, who shall remain liable for any deficiency.



9. If any default be made in any of the covenants herein contained and said default continue for thirty (30) days after notice then it shall be lawful for the said Landlord to re-enter the said premises, and the same to have again, re-possess and enjoy. The said Tenant hereby expressly waives the service of any notice in writing of intention to re-enter, as provided for in Section 998 of the Civil Practice Act, or by any law of the State of New York.

10. If the Tenant shall fail after sixty (60) days notice thereof from the Landlord to comply with any statute, ordinances, rules, orders, regulations or requirements of the Federal, State, or local government, or any of their Departments or Bureaus applicable to the said premises, or if the said Tenant shall file or there shall be filed against the Tenant a petition in bankruptcy or arrangement, or Tenant be adjudicated a bankrupt or make an assignment for the benefit of creditors or take advantage of any insolvency act, the Landlord may, if the Landlord so elects, at any time thereafter terminate this lease and the term hereof, on giving to the Tenant five days notice in writing of the Landlord's intention so to do, and this lease and the term hereof shall expire and come to an end on the date fixed in such notice as if the said date were the date originally fixed in this lease for the expiration hereof.

11. In addition to the rent herein reserved, the Tenant shall pay all taxes, assessments, water charges, sewer rents and all other governmental levies and charges, general and special, ordinary and extraordinary, unforeseen, as well as foreseen, of any kind and nature whatsoever, assessed or imposed against the said premises, or any improvements thereon or any use thereof, regardless of how such taxes and charges are levied (hereinafter referred to as "impositions"), reserving to the Tenant, however, the right to litigate or contest the same with the proper authorities, it being understood and agreed, however, that upon final adjudication thereof such impositions as are finally assessed will be paid within ten (10) days thereafter, Landlord will join in any such proceeding as required but the Tenant to remain liable in any event for any costs or penalties thereby incurred. This



obligation on the part of the Tenant to pay such impositions, however, shall not include any franchise, corporate, estate, inheritance, succession, capital levy, income, profits, revenue or transfer tax of the Landlord levied upon the rents payable under this lease or upon any other income of the said Landlord, nor shall it include any payments of principal or interest on any mortgage now or hereafter placed on the said premises. If prior to the termination of this lease the Tenant has paid or any taxes or impositions are levied against the said premises for a fiscal period beyond the date of termination of this lease, then such tax or imposition shall be apportioned between the parties as of the date of said termination of said lease.

12. The failure of the Landlord to insist upon a strict performance of any of the terms, covenants and conditions herein, shall not be deemed a waiver of any rights or remedies that the Landlord may have, and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions and covenants herein contained. This instrument may not be changed, modified or discharged orally.

13. If the whole of the demised premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, this lease and the term thereof shall terminate on the date of vesting of title in the condemnor, and the net and additional rent provided for herein shall be adjusted and paid or repaid up to said date, and the award, less the expenses incurred by both parties in such proceeding, shall be apportioned and allocated by the parties, and distributed as follows: (a) to the Landlord, that part of the award so allocated to the value of the land as improved, (b) to the Tenant that part of the award so allocated to the cost of the buildings or structures erected by the Tenant on the premises, if any, less depreciation at the rate of  $1\frac{1}{2}\%$  per annum for other than wooden structures, and  $2\frac{1}{2}\%$  per annum for wooden structures, from the date of erection, (c) to the Landlord and Tenant, equally, any balance. If less than the whole of the demised premises is taken, and the remainder is insufficient for the efficient operation of the Tenant's business, the Tenant may cancel this lease on sixty (60) days notice in writing, and on the date specified in

*Hughes Hubbard & Reed*  
*One Wall Street*  
*New York 10005*

JOHN S. ALLEE  
AXEL H. BAUM  
WILLIAM L. BURKE  
GEORGE A. DAVIDSON  
EDWARD S. DAVIS  
JOHN A. DONOVAN  
JOHN WESTERHOFF FASER  
JOHN C. FONTAINE  
JAMES W. GIDDENS  
THOMAS GILROY  
ALLEN S. HUBBARD  
ALLEN S. HUBBARD, JR.  
ED RAUFMANN  
ANALYA L. HEARSE  
RICHARD A. KIMBALL, JR.  
PHILIP A. LACOMARA  
WILLIAM H. LEVIT, JR.

MARTIN E. LOWY  
ALAN H. McLEAN  
RALPHAN A. ORAVETZ  
JAMES F. PARVER  
OTIS PRATT PEARSON  
POWELL PIERPOINT  
HENRY PILSENER, JR.  
EDWARD S. REDINGTON  
JEROME I. ROSENBERG  
ROBERT SCHEFF  
ORVILLE H. SCHELL  
THOMAS G. SCHUELLER  
JEROME G. SHAPIRO  
ROBERT J. SISK  
ROWLAND STEBBINS, JR.  
L. HOMER SURBECK  
DAVID R. TILLINGHAST

212 WHITEHALL 3-6500  
CABLE: HUGHREED NEW YORK  
TELEX: 12-6557

1660 L STREET, N. W.  
WASHINGTON, D. C. 20036  
202-672-8250

515 SOUTH FLOWER STREET  
LOS ANGELES, CALIFORNIA 90071  
213-488-5140

111 EAST WISCONSIN AVENUE  
MILWAUKEE, WISCONSIN 53202  
414-271-8827

47, AVENUE GEORGES MANDEL  
75016 PARIS  
723-8901

ADMITTED IN THE  
DISTRICT OF COLUMBIA ONLY  
GERALD GOLDMAN

ADMITTED IN CALIFORNIA ONLY  
ROBERT A. SCHLEI

November 8, 1976

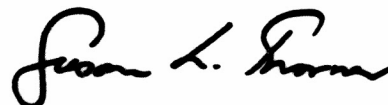
A. Daniel Fusaro  
Clerk of the Court  
United States Court of Appeals  
for the Second Circuit  
Foley Square  
New York, New York 10007

Re: Federal Deposit Insurance Corporation  
v. Grella, et al., No. 76-7438

Dear Sir:

As the result of an error in the reproduction process the last two lines of the original of page A14 of the Joint Appendix were omitted. Pursuant to a stipulation dated November 1, 1976, a correct copy of the original of page A14, which consists of a page of a lease between Jean M. Grella and Franklin National Bank dated April 4, 1961, has been substituted for the incomplete page.

Very truly yours,



Susan L. Thorner

cc: Sprague, Dwyer, Aspland & Tobin  
Attorneys for Defendant-Appellant,  
Jean M. Grella

such notice this lease shall terminate, and the award shall be apportioned and distributed as above set forth, If the Tenant does not elect to cancel this lease, the award shall be apportioned as aforesaid, and the net rent shall be abated in the same proportion as the value of the taking bears to the value of the entire improved property before the taking. If any such taking shall be for a limited time, the Tenant shall be entitled to the entire award, but shall continue to pay the total rent provided for herein without offset or abatement. If such taking is of such a nature or of such duration as to seriously interfere with the Tenant's efficient operation of its business, the Tenant may cancel this lease on sixty (60) days notice in writing as aforesaid, with the effect as above provided, and any award shall be dealt with as the award in a total taking as provided above. In any case herein provided for where the Tenant receives part of the award, and this lease is not terminated, the Tenant covenants to promptly restore and replace that portion of the buildings and structures not taken to a complete architectural unit or units.

14. If after default in payment of rent or violation of any other provision of this lease, or upon the expiration of this lease, the Tenant moves out or is dispossessed and fails to remove any trade fixture or other property prior to such said default, removal, expiration of lease, or prior to the issuance of the final order or execution of the warrant, then and in that event, the said fixtures and property shall be deemed abandoned by the said Tenant and shall become the property of the Landlord. Vandalism shall be considered removable trade fixtures.

15. In the event that the relation of the Landlord and Tenant may cease or terminate by reason of the re-entry of the Landlord under the terms and covenants contained in this lease or by the ejectment of the Tenant by summary proceedings or otherwise, or after the abandonment of the premises by the Tenant, it is hereby agreed that the Tenant shall remain liable and shall pay in monthly payments the rent which accrues subsequent to the entry by the Landlord, and the Tenant expressly agrees to pay as damages for the breach of the covenants herein contained, the difference between the rent reserved and the rent collected and received, if any, by the Landlord during the remainder of the unexpired term, such difference or deficiency between

the rent herein reserved and the rent collected, if any, shall become due and payable in monthly payments during the remainder of the unexpired term, as the amounts of such difference or deficiency shall from time to time be ascertained; and it is mutually agreed between Landlord and Tenant that the respective parties hereto shall and hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties against the other on any matters whatsoever arising out of or in any way connected with this lease, the Tenant's use or occupancy of said premises, and/or any claim of injury or damage.

16. The Tenant waives all rights to redeem under Section 1437 of the Civil Practice Act.

17. The Tenant shall have four (4) separate rights of renewal, each renewal to be for a term of twenty (20) years at \$20,000.00 annual net rent and on the same terms and covenants as set forth herein and to be exercised by the Tenant by serving notice in writing upon the Landlord at least six (6) months before the expiration of the previous term.

18. Landlord will consent to any application of Tenant to rezone premises for business entirely.

19. The Landlord or her agents shall have the right to enter into and upon said premises (other than the portions thereof used as vaults or other enclosures where money, securities or other valuables are kept) at any reasonable hour of the business day for the purpose of examining the same and the Tenant also agrees to permit the Landlord, or her agents, to show the premises (other than the portion thereof used as vaults or other enclosures where money, securities or other valuables are kept) to persons wishing to hire or purchase the same and the Tenant further agrees that on or after the sixth month next preceding the expiration of the term herein the Landlord, or her agents, shall have the right to place notices on the front of the said premises or any part thereof offering the premises "to let" or "for sale", and the Tenant agrees to permit the same to remain without hindrance.

20. Any notices required to be served under this lease shall be served on the parties at the addresses set forth at the head of this lease

unless either party serves the other in writing with a notice of change of address.

21. The Landlord covenants that during her ownership of said premises the said Tenant on paying the said yearly rent, and performing the covenants aforesaid, shall and may peacefully and quietly have, hold and enjoy the said demised premises for the term aforesaid.

22. It is agreed that E & W REALTY COMPANY, of No. 158 Third Street, Mineola, N. Y., is the only broker who brought this deal about. The Tenant agrees to pay the commissions for the first twenty (20) years of this lease only in accordance with a separate agreement.

23. Upon demand of either party a memorandum copy of this lease will be executed setting forth the terms hereof for the purpose of recording.

24. The Landlord represents that she has good title to the premises and the right to execute this lease and if any defect in title or claim should be established having priority to this lease and if the Landlord, or her successors, fail to cure the same then the Tenant shall have the right to remedy the same deducting the cost and expense thereof from subsequent rents.

25. The covenants and agreements herein contained shall bind and inure to the benefit of the Landlord, her legal representatives and assigns, and the Tenant, its successors and assigns, subject to the provisions of this lease.

IN WITNESS WHEREOF, the parties have executed this lease on the day and year first above written.

*Jean H. Gralla*  
 Jean H. Gralla

THE FRANKLIN NATIONAL BANK  
 OF LONG ISLAND

*[Signature]*  
 Chairman of Board

Exhibit B Annexed to Complaint

(Notice of Default)

FIVE DAY NOTICE OF DEFAULT

A 1.7

Re: Premises 114 Old Country Road  
Mineola, New York  
Nassau County Land & Tax Map  
Section 9, Block 350  
Lots 4, 5, 6, 7, 14, 15, 16 & 17

Ground Lease between  
Jean M. Grella, Landlord and  
Franklin National Bank  
of Long Island, Tenant  
dated April 1, 1961

TO: FRANKLIN NATIONAL BANK  
c/o Federal Deposit Insurance Corporation  
as Receiver of Franklin National Bank  
550 17th Street, N.W.  
Washington, D.C. 20006

MINEOLA OFFICE BUILDING, INC.  
100 North Merrick Road  
Rockville Centre, New York 11570

WOODMERE KNOLLS, INC.  
100 North Merrick Road  
Rockville Centre, New York 11570

RELIANCE FEDERAL SAVINGS & LOAN ASSOCIATION  
OF NEW YORK  
89-61 - 162nd Street  
Jamaica, New York 11432

THE LEVER COMPANY  
585 Stewart Avenue  
Garden City, New York 11530

S I R S :

I am informed that on October 8, 1974, FRANKLIN  
NATIONAL BANK was declared insolvent by the Comptroller of the

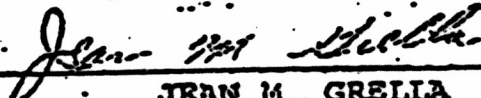


the Currency and pursuant to 12 U.S.C. §191 and 12 U.S.C. §1821 the Federal Deposit Insurance Corporation has been appointed Receiver of the aforesaid Bank.

I am further informed that at one time or another each of you had purported to claim an interest in the lease captioned above, and accordingly you are hereby notified that the insolvency of FRANKLIN NATIONAL BANK constitutes a default pursuant to paragraph "10" of the lease and you are hereby informed that pursuant to the provisions of the lease and as Landlord, I have elected to terminate the lease effective February 11, 1975. This is your 5 day notice.

In accord with paragraph "2" of the lease, please arrange with my attorneys, Sprague, Dwyer, Aspland & Tobin, P.C. 220 Old Country Road, Mineola, New York 11501, to deliver up the premises in good order and condition upon the expiration date heretofore set forth.

Dated: February 3, 1975.

  
JEAN M. GRELLA

Certified Mail  
Return Receipt Requested



Answer of Defendant Jean M. Grella

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

*File Copy*  
A 19

----- X

FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

(O.G.J.)

75 C. 276

-against- :

JEAN M. GRELLA, LAWRENCE LEVER and :  
RELIANCE FEDERAL SAVINGS AND LOAN :  
ASSOCIATION OF NEW YORK, :

A N S W E R

Defendants. :

----- X

The defendant, JEAN M. GRELLA, by Sprague, Dwyer,  
Aspland & Tobin, P.C., her attorneys, answering the complaint  
herein:

1. Denies that F.D.I.C. as receiver of Franklin  
National Bank has standing to bring this suit, and that the  
ground lease, a copy of which is attached to the complaint,  
as Exhibit A is any part of the assets of Franklin National  
Bank, and otherwise admits the allegations contained in para-  
graph "1" of said complaint.

2. Denies each and every allegation contained in  
paragraph "5" of said complaint.

3. Denies knowledge or information sufficient to  
form a belief as to each and every allegation contained in  
paragraph "7" of said complaint.

4. Admits that the Village of Mineola changed the zoning classification of defendant's premises from Business Use to Special Office Use, and otherwise denies each and every allegation contained in paragraph "8" of said complaint.

5. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "9", "10", "11" and "13" of said complaint.

6. Admits receipt of a communication dated January 7, 1965, and otherwise denies each and every allegation contained in paragraph "12" of said complaint.

7. Denies each and every allegation contained in paragraphs "14", "18", "20", "22" and "23" of said complaint.

8. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "17" of said complaint.

9. Admits that if the termination of the ground lease is effective, Grella will re-enter and repossess the ground and the building thereon and that permanent improvements in the branch office space may be forfeited to her, and otherwise denies each and every allegation contained in paragraph "21" of said complaint.

FOR A FIRST DEFENSE

10. The plaintiff lacks standing to bring this suit.

FOR A SECOND DEFENSE

A 21

11. There does not exist a present case or controversy between the plaintiff as receiver and the defendant.

FOR A THIRD DEFENSE

12. The complaint fails to state a claim for which relief may be granted.

WHEREFORE, defendant demands judgment dismissing the complaint, or in the alternative, declaring that the notice of termination of the ground lease is effective and the ground lease is terminated, with the costs and disbursements of this action.

Dated: Mineola, New York

March 28, 1975.

SPRAGUE, DWYER, ASPLAND & TOBIN, P.C.

By:

James T. Tobin  
A Member of the Firm

Attorneys for Defendant, Jean M. Grella  
Office and Post Office Address:  
220 Old Country Road  
Mineola, New York 11501  
Telephone: 516-746-5700

**Plaintiff's Notice of Motion for Summary Judgement**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 22

----- x  
FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank,

Plaintiff,

- against-

JEAN M. GRELLA, LAWRENCE LEVER, and  
LEVER HOLDING CORP.,

Defendants.

:

:

:

:

:

:

75 C. 276  
(O.G.J.)

NOTICE OF MOTION

----- x  
S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavits of Susan L. Thorner, sworn to February 2, 1976, W. Norman Davis, sworn to February 2, 1976, and Lawrence Lever, sworn to January 31, 1976, and together with the exhibits annexed thereto, and upon all the pleadings, affidavits and proceedings heretofore had herein, the undersigned will move this Court, in Courtroom 11, at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on February 13, 1975, at 10:00 o'clock A.M. or as soon thereafter as counsel may be heard, for an order:

(a) pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in favor of plaintiff Federal Deposit Insurance Corporation, on its claim as stated in paragraphs 1 through 22, inclusive, of the complaint, on the ground that there are no genuine issues to be tried; and

(b) granting such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York  
February 3, 1976

Yours, etc.

HUGHES HUBBARD & REED

By Amalya L. Keene  
A Member of the Firm  
Attorneys for Plaintiff  
One Wall Street  
New York, New York 10005  
(212) 943-6500

TO: SPRAGUE, DWYER, ASPLAND & TOBIN, P.C.  
Attorneys for Defendant Jean M. Grella  
200 Old Country Road  
Mineola, New York

WOLF & DIAMOND  
Attorneys for Defendants Lawrence Lever  
and Lever Holding Corp.  
100 Garden City Plaza  
Garden City, New York

Statement Under Rule 9(g) of  
the General Rules of the United States District Court  
For The Eastern District of New York Annexed To No-  
tice of Motion For Summary Judgement.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

A 24

----- x  
FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, : (O.G.J.)  
: 75 C. 276

- against -

JEAN M. GRELLA, LAWRENCE LEVER, and  
LEVER HOLDING CORP.,

Defendants.  
----- x

STATEMENT UNDER RULE 9(g) OF THE  
GENERAL RULES OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF NEW YORK

The following are the material facts as to which plaintiff Federal Deposit Insurance Corporation ("FDIC"), the moving party herein, contends that there is no genuine issue to be tried.

1. Plaintiff FDIC as receiver of Franklin National Bank ("FNB") is an agency of the United States Government organized and existing under and by virtue of an act of Congress (12 U.S.C. §§ 1811-1831) and is expressly authorized by Congress to sue (12 U.S.C. § 1819).

2. Defendant Jean M. Grella ("Grella") is a resident of Nassau County, residing at 20 Wendell Street, Hempstead, Long Island, New York. As of April 4, 1961 Grella was the owner of the fee interest in certain then unimproved land in Mineola, Long Island, located on the north side of Old Country Road between Willis Avenue and Roslyn Road.

3. On April 4, 1961, Grella and FNB, then known as Franklin National Bank of Long Island, entered into an agreement pursuant to which Grella leased her property to FNB for a term to expire on February 28, 1981, with four

options to renew for twenty years each (hereinafter "Ground Lease").

4. Grella was represented by an attorney named Joseph R. D'Arrigo throughout the period of negotiation and execution of the Ground Lease. Grella had retained Mr. D'Arrigo on various matters for six years prior to that period and continued to retain him thereafter.

5. Commencing on or about November 1, 1962, FNB entered into several agreements with defendants Lawrence Lever ("Lever") or his wholly-owned corporations named Mineola Office Building, Inc. ("MOB") and Woodmere Knolls, Inc. ("Woodmere"), pursuant to which Lever or his companies ultimately received an assignment of FNB's interest in the Ground Lease.

6. On January 7, 1965 Woodmere delivered to Grella a signed declaration that Woodmere, then assignee of the Ground Lease, was exercising its first two renewal options as Tenant under the Ground Lease, in order to extend the term of the Ground Lease to February 28, 2021.

7. On January 7, 1964 a building permit was issued to one of Lever's companies for the construction of an office building ("Lever's Building") on Grella's property. The building was completed in June 1965. Construction cost approximately \$1.3 million and the building is now worth \$3.5-4.5 million. Grella was aware of the fact that the building was constructed by Lever. Lever's Building was completed in 1965 and FNB subleased space in it for use as a branch office.

8. Lever is the present assignee of the Ground Lease and has paid the rent due under the Ground Lease every year beginning with 1965.

9. On October 8, 1974 the Comptroller of the Currency of the United States declared FNB insolvent pursuant

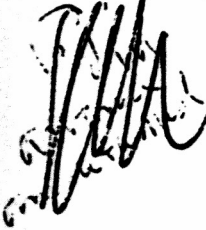
to 12 U.S.C. § 191 and appointed FDIC as receiver pursuant to 12 U.S.C. § 1821(c). As receiver of FNB, FDIC had exclusive dominion and control of FNB's assets.

10. FDIC's statutory powers include authority to insure depositors up to a statutory maximum and authority to act as receiver of closed banks. When a national bank is declared insolvent and FDIC is appointed receiver, two principal courses of action are available: FDIC may pay claims of depositors up to the statutory maximum out of its insurance fund; or it may enter into a transaction in which a healthy bank purchases assets and assumes liabilities of the closed bank, if it determines that a risk of loss to its insurance fund will thereby be reduced or averted.

11. Prior to the declaration of FNB's insolvency FDIC solicited bids for a purchase and assumption transaction from healthy banks with the hope that banking services to the segment of the public served by FNB could be continued without interruption. Bids were submitted by four banks. The bid of European-American Bank & Trust Company ("EAB"), which included a premium of \$125 million, was the highest bid submitted. FDIC determined that a purchase and assumption transaction with the premium offered by EAB would reduce the risk of loss to FDIC's insurance fund. Consequently FDIC entered into a Purchase and Assumption Agreement with EAB on October 8, 1974.

12. Prior to October 8, 1974 EAB had no branch offices in Nassau County. An important factor in a bank's willingness to enter into a purchase and assumption transaction is the belief that it will be able to become established in new territory while providing uninterrupted banking services to customers of the closed bank.

13. Immediately after the Court approved the Purchase and Assumption transaction on October 8, 1974, EAB entered into the leased branch office premises in Lever's Building as licensee of FDIC as receiver. Since October 8, 1974 EAB has been providing to FNB depositors and to the community the banking services that had previously been provided by FNB. EAB has advised the Receiver that it desires to take an assignment of FNB's sublease on the branch office space in Lever's Building and, in accordance with the Purchase and Assumption Agreement, to buy from FDIC as receiver at appraised value certain improvements and personalty located in the branch office space. Lever has indicated that he will consent to such an assignment.

 15. In January 1975, Lever paid the entire rent due on March 1, 1975 for the year March 1, 1975 through February 29, 1976. Grella deposited the payment in her bank account.

16. On February 3, 1975, Grella served notice on FNB, in care of FDIC as receiver, and on MOB, Woodmere, Reliance and Lever, purporting to terminate the Ground Lease as of February 11, 1975, claiming that the insolvency of FNB, declared by the Comptroller of Currency on October 8, 1974, constituted a default under Paragraph 10 of the Ground Lease. Enclosed with the termination notice to Reliance was Grella's personal check, dated January 30, 1975, payable to Reliance in the amount of \$21,000.

17. Paragraph 10 of the Ground Lease states, in pertinent part, as follows:

"If the said Tenant \* \* \* shall file or there shall be filed against the Tenant a petition in bankruptcy or arrangement, or Tenant be adjudicated a bankrupt or make an assignment for the benefit of creditors or take advantage of any insolvency act, the Landlord may, if the Landlord so elects, at any time thereafter terminate this lease

and the term hereof, on giving to the  
Tenant five days notice in writing of the  
Landlord's intention so to do, and this  
lease and the term hereof shall expire\* \* \*."

A 28

18. FNB has never filed a petition in bankruptcy or arrangement, nor has such a petition ever been filed against FNB. FNB has never been adjudicated a bankrupt, has never made an assignment for the benefit of creditors, and has never taken advantage of any insolvency act.

19. Lever has never filed a petition in bankruptcy or arrangement, nor has such a petition ever been filed against him. He has never been adjudicated a bankrupt, has never made an assignment for the benefit of creditors, and has never taken advantage of any insolvency act.

Dated: New York, New York  
February 3, 1976

HUGHES HUBBARD & REED

By Analya L. Kease  
A Member of the Firm  
Attorneys for Plaintiff  
Federal Deposit Insurance  
Corporation  
One Wall Street  
New York, New York 10005  
WH 3-6500

**Affidavit of Susan L. Thorne**

**In Support of Motion For Summary Judgment**



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 29

FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

75 C. 276  
(O.G.J.)

- against -

JEAN M. GRELLA, LAWRENCE LEVER, and :  
LEVER HOLDING CORP., :

AFFIDAVIT

Defendants. :

STATE OF NEW YORK )

: ss.:

COUNTY OF NEW YORK )

SUSAN L. THORNER, being duly sworn, deposes and says:

1. I am associated with the firm of Hughes Hubbard & Reed, attorneys for the plaintiff herein, am a member of the bar of this Court, and am familiar with the facts and proceedings herein. I make this affidavit in support of plaintiff's motion for summary judgment.

2. Plaintiff Federal Deposit Insurance Corporation as Receiver ("FDIC") of Franklin National Bank ("FNB") ~~seeks a judgment declaring void defendant Grella's notice of termination of a lease of certain property on Old Country Road in Mineola, Long Island entered into by Grella and FNB (the "Ground Lease"), and an order permanently enjoining Grella from taking any action to terminate the Ground Lease on the basis of the October 8, 1974 declaration of the Comptroller of the Currency that FNB was insolvent. The events of October 8, 1974 are a matter of public record in this Court. In the Matter of the Liquidation of Franklin National Bank, Civ. No. 74 C 1434. A copy of the Ground Lease is annexed hereto as Exhibit A.~~



3. Facts in support of the present motion which are within the knowledge of FDIC or defendant Lawrence Lever ("Lever") are presented in the affidavits of W. Norman Davis and Lawrence Lever, respectively, submitted with this motion. In addition, FDIC relies on certain facts which have already been established in an evidentiary hearing herein. On March 4, 1975, a hearing was held on a motion by FDIC for a preliminary injunction. The Court's Findings of Fact are set forth in an Order dated March 13, 1975 granting the preliminary injunction. A copy of the Court's Order is annexed hereto as Exhibit B.\*

4. On October 30, 1975, I attended a deposition of defendant Grella, which was taken by the attorneys for Lawrence Lever ("Lever"), who is a defendant herein. The deposition was taken for use in an action commenced by Lever in the Supreme Court of the State of New York, County of Nassau, on February 11, 1975, entitled Lawrence Lever against Jean M. Grella and Reliance Federal Savings and Loan Association of New York. In that action, Lever, who is the present assignee of FNB's interest in the Ground Lease, is seeking relief similar to that requested by FDIC in this action.

5. During the deposition, defendant Grella testified in part as follows: that in connection with the negotiation and execution of the Ground Lease she was represented by an attorney named Joseph D'Arrigo, that she had been represented by D'Arrigo on various matters for six years prior to that time, that she continued to retain D'Arrigo for about a year and a half there-

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\* The caption of Exhibit B reflects the parties that were then before the Court. By order dated November 11, 1975, Lever Holding Corp. was substituted for Reliance Federal Savings and Loan Association of New York ("Reliance") as a defendant herein and the caption was amended accordingly.

after, and that an agreement executed by Grella and FNB binding the parties to enter into a formal ground lease was signed in D'Arrigo's office. A copy of these portions of Grella's deposition testimony is annexed hereto as Exhibit C. The binder agreement, a copy of which is annexed hereto as Exhibit D, was witnessed by D'Arrigo as to defendant Grella.

6. The fact that Grella was aware that the building that is now on her property was constructed by [redacted] is set forth in paragraph 6 of an affidavit of Jean M. Grella, sworn to March 4, 1975, which is annexed hereto as Exhibit E.

7. The facts relating to payment by Lever or his companies to Reliance of the annual rent due under the Ground Lease from 1965 through 1975, and Reliance's payment of the same to Grella, are reflected in the copies of canceled checks that are attached hereto as Exhibit F, and in paragraph 8 of an affidavit of Jean M. Grella, sworn to July 3, 1975, which is annexed hereto as Exhibit G. Said canceled checks were received in evidence without objection during the evidentiary hearing referred to in paragraph 3 above.

*Susan L. Thorner*

Susan L. Thorner

Subscribed and sworn to before me  
this 2<sup>nd</sup> day of February, 1976.

*Geraldine E. Griffin*

GERALDINE E. GRIFFIN, Notary Public  
State of New York - No. 41-1371333  
Qualified in Queens County  
Certificate filed in New York County  
Commission Expires March 30, 1977

Exhibit A Annexed to Affidavit of Susan L. Thorner

Same as Exhibit A Annexed to Complaint Reproduced at Page A9

Exhibit B Annexed to Affidavit of Susan L. Thorner  
(Order of Orrin G. Judd, J. Dated March 13, 1975  
Granting Plaintiff's Motion For Preliminary In-  
junction)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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FEDERAL DEPOSIT INSURANCE CORPORATION,	:	
as Receiver of Franklin National Bank,	:	
	:	
Plaintiff,	:	
	:	(O.G.J.)
-against-	:	75 C. 276
	:	
JEAN M. GRELLA, LAWRENCE LEVER, and	:	
RELIANCE FEDERAL SAVINGS AND LOAN	:	PRELIMINARY
ASSOCIATION OF NEW YORK,	:	<u>INJUNCTION</u>
Defendants.	:	

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This cause having come on to be heard on plaintiff's motion for a preliminary injunction against certain acts by defendant Jean M. Grella, and the Court having considered the complaint, the affidavits and memoranda submitted in support of said motion and in opposition thereto, and having considered the statement in defendant Grella's memorandum that "All of the essential facts set forth in the complaint and in the moving affidavits (not including the pleader's or affiants' inferences and conclusions) are undisputed," and having heard oral evidence and received documents in open court, and having taken judicial notice of certain matters of public record, the Court makes the following

FINDINGS OF FACT

1. Plaintiff Federal Deposit Insurance Corporation ("FDIC") is an agency of the United States Government organized and existing under and by virtue of an act of Congress (12 U.S.C. §§ 1811-1831), and is expressly authorized by Congress to sue (12 U.S.C. § 1819). On October 8, 1974, pursuant to

12 U.S.C. §§ 191 and 1821(c), FDIC was appointed receiver of Franklin National Bank ("FNB") by the Comptroller of the Currency of the United States. As receiver of FNB ("Receiver"), FDIC has exclusive dominion and control of FNB's assets.

2. Defendant Jean M. Grella ("Grella") is a resident of Nassau County, residing at 20 Wendell Street, Hempstead, Long Island, New York. As of April 4, 1961, Grella was the owner of the fee interest in certain unimproved land in Mineola, L.I., located on the north side of Old Country Road between Willis Avenue and Roslyn Road.

3. On April 4, 1961, Grella and FNB, then known as Franklin National Bank of Long Island, entered into an agreement pursuant to which Grella leased her property to FNB for a term to expire on February 28, 1981, with four options to renew for twenty years each (hereinafter "Ground Lease").

4. Commencing on or about November 1, 1962, FNB entered into several agreements with defendant Lawrence Lever ("Lever") or his wholly-owned corporations named Mineola Office Building, Inc. ("MOB") and Woodmere Knolls, Inc. ("Woodmere"), pursuant to which Lever or his affiliates ultimately received an assignment of FNB's interest in the Ground Lease.

5. Lever planned to construct an office building on Grella's property. In order to build the contemplated office building, Lever requested a zoning variance from the Village of Mineola. ~~Grella joined with Lever in making an application for such a variance in 1963 and the application was granted.~~

6. Lever constructed an office building ("Lever's Building") which was completed in 1965. FNB subleased space in Lever's Building for use as a branch office.

7. On January 7, 1965, Woodmere delivered to Grella a signed declaration that Woodmere, then assignee of the Ground

005  
405  
Lease, was exercising its first two renewal options as Tenant under Paragraph 17 of the Ground Lease, thereby ~~extending~~ the term of the Ground Lease to February 28, 2021.

8. Lever is the present assignee of the Ground Lease subject to a collateral assignment of the Ground Lease to defendant Reliance Federal Savings and Loan Association of New York ("Reliance"), a savings and loan association organized under the laws of the United States of America. Grella was notified of the assignments.

9. On October 8, 1974, the Comptroller of the Currency of the United States declared FNB insolvent. On that date FDIC, as Receiver of FNB, entered into a Purchase and Assumption Agreement pursuant to which it sold certain of FNB's assets and transferred certain of FNB's liabilities to European-American Bank & Trust Company ("EAB"), a New York bank and trust company.

10. Immediately after the Court's approval of the Purchase and Assumption transaction, EAB entered into the leased branch office premises in Lever's Building as licensee of the Receiver. Since October 8, 1974 EAB has been providing to FNB depositors and to the community the banking services that had previously been provided by FNB. EAB has advised the Receiver that it desires to take an assignment of FNB's sublease on the branch office space in Lever's Building and, in accordance with the Purchase and Assumption Agreement, to buy from the Receiver at appraised value certain improvements and personalty located in the branch office space. Lever has indicated that he will consent to such an assignment.



11. Since at least 1965 it has been customary for Lever or his affiliates, as tenants in possession, to pay to Reliance in January <sup>in February</sup> of each year, the annual rent due under the Ground Lease on the following March 1. Reliance then paid to Grella the annual rent due under the Ground Lease prior to the March 1 due date.

12. On January 10, 1975, Lever paid Reliance the sum of \$21,000 and on January 13, 1975, Reliance paid Grella, by its check in the amount of \$21,000, the rent due for the year March 1, 1975 through February 29, 1976.

13. Grella deposited Reliance's check for the 1975-1976 annual rent in her savings account on January 15, 1975.

14. On February 3, 1975, Grella served notice on FNB, in care of FDIC as Receiver, and on MOB, Woodmere, Reliance and Lever, purporting to terminate the Ground Lease as of February 11, 1975, claiming that the insolvency of FNB, declared by the Comptroller of Currency on October 8, 1974, constituted a default under Paragraph 10 of the Ground Lease. Enclosed with the termination notice to Reliance was Grella's personal check, dated January 30, 1975, payable to Reliance in the amount of \$21,000.

15. ~~The declaration by the Comptroller of Currency of FNB's insolvency is not an event of default specified in Paragraph 10 of the Ground Lease.~~

16. Grella has known of the <sup>insolvency</sup> of FNB since the fall of 1974.

17. Reliance returned Grella's personal check. Grella's attorneys later sent the same check again to Reliance, where it remains uncashed.

18. EAB's ability to use the branch office space in

Lever's Building is uncertain in the event the Ground Lease is terminated. The closing of this branch office would be a serious matter as to FDIC as Receiver because of the various ramifications to its Purchase and Assumption Agreement with EAB.

20. There will be <sup>no</sup> hardship on Grella in maintaining the status quo and the balance of hardships swings quite strongly to the side of the plaintiff.

On the basis of the foregoing, the Court makes the following

#### CONCLUSIONS OF LAW

1. The controversy arises under the laws of the United States, specifically, 12 U.S.C. §§ 1819 and 1821(c).

2. The amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000), exclusive of interest and costs.

3. The Court has jurisdiction over the subject matter of this action by virtue of 12 U.S.C. § 1819 and 28 U.S.C. §§ 1331, 1345 and 1348.

4. Plaintiff has standing to sue.

5. Plaintiff has raised sufficiently serious questions going to the merits to make them fair ground for litigation.

And it is therefore

ORDERED that defendant Grella, her agents, servants, employees, privies, successors, assigns, attorneys, all persons under their control, direction, permission or license, and all persons in active concert and participation with them or any of them, be and they are hereby restrained until further order of this Court from

*taking any further steps to*  
 (a) ~~terminating~~ the Ground Lease on the

basis that on October 8, 1974 the Comptroller of the Currency of the United States declared that FNB was insolvent and appointed the FDIC

as Receiver of FNB, *except as part of our proceedings, on notice to the Receiver;*

(b) re-entering the premises covered by the Ground Lease or any of the improvements constructed thereon and recovering possession thereof by any means whatsoever, including without limitation, summary proceedings, so long as the Ground Lease remains in full force and effect;

(c) taking any action inconsistent with the rights of FNB and its assignees under the Ground Lease or a lease agreement whereby space in the building constructed on the ~~parcel~~ covered by the Ground Lease was leased to FNB;

(d) interfering in any way with plaintiff's assignment of FNB's lease of the branch office space to European-American Bank & Trust Company ("EAB") as agreed to by EAB and Lawrence Lever.

✓  
 ✓  
 Dated: Brooklyn, New York  
 March 13, 1975

*[Signature]*  
 U.S.D.J.

Exhibit C Annexed to Affidavit of Susan L. Thorne

(Portions of Jean M. Grella's Deposition)

Grella

A 32

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1

2

the signatures on that document?

3

MR. LYNN: Object as to the form.

4

If it is a photocopy, there are no signatures.

5

6

7

MR. LUPOFF: If you object to the photocopy of the purported signatures on that document --

8

MR. LYNN: I want to be precise.

9

A That's mine.

10

Q Do you recognize the other one?

11

A It doesn't look like the same.

12

Q That purports to be a reproduction

13

of the signature of James G. Smith, did you ever meet

14

a man by that name at the bank?

15

A I don't remember.

16

Q Did you ever meet Mr. Roth?

17

A No.

18

Q Were you present when the lease was

19

signed?

20

A With my attorney at the time.

21

Q Where was it signed?

22

A In my attorney's office.

23

Q Who was that attorney?

24

A D'Arrigo, Joseph D'Arrigo.

25

Q Where was his office?



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In Hempstead.

A

33

Q

Do you recall when the lease was signed?

A

No, I don't remember.

Q

Was it at or about the day shown on the lease, April 4, 1961?

A

I really don't remember.

Q

Did you sign it before the representative from the bank signed it?

A

I don't remember that.

Q

Was this lease entered into in accordance with any preliminary agreements or binder agreements between you and the bank?

A

I don't remember.

Q

Do you recall making a deposition in this action about a binder agreement that you had signed?

A

I don't remember.

Q

Do you recall a draft lease or binder that had been prepared by Mr. Magioncalda, the attorney for the bank -- do you recall signing an affidavit swearing to it, July 3rd, 1975, in this action?

A

I didn't quite understand that?

Q

I'll rephrase it.

Would you look at these papers which



1  
2 are entitled, Affidavit in Support of Defendant's Motion  
3 for Summary Judgment, and appear to have been signed by  
4 Jean M. Grella and sworn to the 3rd day of July, 1975.

5 All I'm asking is that you look at  
6 this and look at the last page and see if that appears  
7 to be your signature?

8 A Yes, this is mine.

9 Q Do you recall signing this affidavit?

10 A Yes.

11 Q In paragraph six of that affidavit you  
12 state, in part, my son spoke to Mr. Michael P. Aspland  
13 who undertook to review the binder and draft lease pre-  
14 pared by the bank's attorney, Andrew Magioncalda.

15 Do you remember the binder or the  
16 draft lease?

17 A Yes. I recall it now when they came  
18 over.

19 Q Who came over?

20 A Mr. Erickson.

21 Q Who is Mr. Erickson?

22 A He's the attorney that made the deal  
23 with Franklin National Bank.

24 Q Was he an attorney or broker?

25 MR. LYNN: He's both.





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25

A A broker and attorney.

Q Was he representing any party in that transaction as an attorney?

A The Franklin National Bank. I thought it was.

Q Was he paid a brokerage commission, if you know?

A I don't know. I didn't pay any.

Q Do you recall the essential terms of that binder agreement -- withdrawn.

Do you have a copy of the binder agreement?

A I don't know.

MR. LYNN: I have an unsigned copy.

MR. LUPOFF: Let the record show that counsel has produced an unsigned copy of a two-page agreement dated blank day of February, 1961.

Q Miss Grella, would you look at this photocopy of a two-page agreement. It appears to be dated February 13, 1961, and tell us if you recognize this and recognize the signatures?

A Yes, I signed this.

Q Is that a copy of the binder to which



1  
2 you refer in paragraph six of the affidavit?

3 A Yes.

4 Q Do you recognize the other signatures?

5 A Yes.

6 ? Whose signatures are they?

7 A Roth.

8 Q Arthur Roth?

9 A Arthur Roth.

10 Q On behalf of the bank?

11 A I beg your pardon?

12 Q He signed on behalf of the bank?

13 A Yes.

14 Q Is Mr. D'Arrigo's signature on that?

15 A Yes, it is.

16 MR. LUPOFF: Would you mark this as  
17 Plaintiff's exhibit two for identification,  
18 please.

19 (Whereupon, the above-mentioned docu-  
20 ment was marked as Plaintiff's exhibit number  
21 two for identification, this date.)

22 Q Do you recall where, when you signed  
23 this binder agreement?

24 A I don't recall when or where it was  
25 signed.



1  
2 Q Do you believe it would have been  
3 signed at or about the day shown on the agreement?

4 MR. LYNN: Objection.

5 A No, I don't remember.

6 Q Do you recall where it was signed?

7 A At Mr. D'Arrigo's office.

8 Q Is that his office on Franklin Street  
9 in Hempstead?

10 A Yes.

11 Q Do you recall when you sent a copy of  
12 this to Mr. Aspland, approximately?

13 A No, I don't.

14 Q Did you send him a copy of it before  
15 you signed it?

16 A I don't remember.

17 Q How long had Mr. D'Arrigo represented  
18 you?

19 A Quite a while. He was doing other  
20 work for me. I'd say about -- about maybe six years.

21 Q Prior to 1961, he started representing  
22 you in the mid-1950's?

23 A After 1955 I met him and he did other  
24 work for me and then this came on and continued with  
25 this.



1  
2 Q Did he represent you after this binder  
3 and the lease were signed?

4 A Yes, for a while.

5 Q Approximately how long?

6 A Oh, maybe another year and a half  
7 because he was working for my son and then he was work-  
8 ing for me.

9 Q Did he move from New York?

10 A I don't know if he moved from New York  
11 but he moved from Hempstead.

12 Q Do you have any idea where he moved?

13 A No, I have no idea. I haven't seen  
14 him since.

15 Q Since when?

16 A It must be about ten years, maybe more.

17 Q At the same time that Mr. D'Arrigo  
18 was representing you, were you also represented by other  
19 counsel?

20 A Mr. Aspland.

21 Q That's Mr. Aspland of the Sprague  
22 firm that is representing you now?

23 A Yes.

24 Q How long did he represent you?

25 A While this deal was going on, this



Exhibit D Annexed to Affidavit of Susan L. Thorner  
(Binder Agreement dated February 18, 1967 Between Jean M. Grella  
and Franklin National Bank)

THIS AGREEMENT made this <sup>11<sup>th</sup></sup> day of February 1961 between JEAN M. GRELLA, residing at 10 Fair Court, Garden City, (hereinafter called "The Owner") and the FRANKLIN NATIONAL BANK, a New York corporation having its office at Second Street, Mineola, New York, (hereinafter called "The Bank").

WHEREAS, the Owner has fee title to certain premises located in Mineola, New York, known as 112 Old Country Road, also known as Tax Lots 4, 5, 6, 7, 14, 15, 16 and 17 in Block 350 on the Land Map of Mineola, Nassau County, New York; and

WHEREAS, the Bank desires to lease said premises;

NOW THEREFORE, in consideration of the sum of \$5,000., receipt of which is hereby acknowledged by the Owner, the Owner agrees to lease said premises to the Bank and the Bank agrees to hire the same pursuant to a more formal lease to be entered into between the parties hereto, said lease to contain the following provisions:

#1. The lease shall be for a term of 20 years to commence on March 1, 1961, and shall contain four renewal options of 20 years each exercisable by the Bank.

#2. The rental under said lease shall be \$21,000. per annum net; the Bank to assume all charges including taxes, insurance, etc.; the rental for the renewal terms shall be \$20,000. per annum.

#3. Upon execution of said lease, the bank shall pay to the Owner an additional sum of \$37,000. *is high sum, together with the \$5,000. which is credited to the rental for the first two years.*

#4. The Bank shall not require the Owner to subordinate her fee interest in the premises to any charges or liens of any nature, whether in connection with financing or otherwise.

#5. The parties agree that E. & W. Realty Co. of 158 Third Street, Mineola, New York, is the broker involved in this transaction.

#6. The bank shall demolish the building structures on the premises at its own cost and expense.

#7. The lease shall, in addition to the above, contain such other terms and provisions as are customary in a net lease transaction and mutually satisfactory to the parties hereto.

#8. In the event that the Bank shall fail to enter into a formal lease on or before March 15, 1961, then and in that event, this binder agreement shall be deemed null and void and thereupon

*Amended  
to 3/31/61  
K. H. King*

Exhibit D



neither party shall have any further rights or obligations thereunder, except that the Owner shall be permitted to retain the \$5,000. paid by the Bank on execution hereof as liquidated damages.

*Witnessed by  
Joseph R. D'Amico  
A, to owner*

*Jean M. Grella* L.S.  
JEAN M. GRELLA - Owner

THE FRANKLIN NATIONAL BANK

By *[Signature]*  
Chairman of the Board

The premises involved are located on the north side of Old Country Road, in Mineola, N. Y., between Willis Avenue and Roslyn Road, and have a frontage on Old Country Road of 200 feet and extending northerly approximately 200 feet to the south side of Third Street, being known as Lots 4, 5, 6, 7, 14, 15, 16 and 17 in Block 350 on Nassau County Land and Tax Map.

In addition to the right to demolish, the Bank shall have the right to construct such building or buildings as it may desire on the said premises. All such construction shall be at the Tenant's own cost and expense and the Tenant agrees to hold the Landlord harmless from any liens or claims of contractors thereunder.

The Bank shall also have the right to assign or sublet without the consent of the Landlord but shall, of course, continue to remain liable for the rent and all of the other obligations on the part of the Tenant.

*Joseph R. D'Amico  
A, to owner*

*Jean M. Grella* L.S.  
Jean M. Grella - Owner

THE FRANKLIN NATIONAL BANK

By *[Signature]*  
Chairman of the Board

Exhibit E Annexed to Affidavit of Susan L. Thorne  
(Affidavit of Jean M. Grella In Support of Defendant's Cross  
Motion to Dismiss Complaint or, in the Alternative, to Deny  
Plaintiff's Request For Preliminary Injunction)



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- x

FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

- against - :

(O.G.J.)  
75 C. 276

JEAN M. GRELLA, LAWRENCE LEVER, and  
RELIANCE FEDERAL SAVINGS AND LOAN  
ASSOCIATION OF NEW YORK,

Defendants. :

----- x

STATE OF NEW YORK )  
: ss.  
COUNTY OF NASSAU )

AFFIDAVIT IN SUPPORT  
OF DEFENDANT'S MOTION  
TO DISMISS

JEAN M. GRELLA, being duly sworn, deposes and  
says:

1. I am a defendant in the within action and  
make this affidavit in support of the motion to dismiss the  
complaint, or alternatively, to deny plaintiff's request for a  
preliminary injunction. |

2. I am the owner of a parcel of real property  
located on Old Country Road in Mineola, New York, which has been

leased since 1961 to the Franklin National Bank. The sole issue before the Court arises out of my termination of that ground lease based upon the demise of Franklin National Bank as a viable entity. Before discussing the particulars with respect to that issue, I think I should apprise the Court of the history of that property and my involvement with it.

3. I am a widow and for many years my husband and I operated a diner in Mineola and lived in a house located on the subject property. Many years ago we moved our diner onto the property and located it directly in front of our home and both lived and earned our living there.

4. After the death of my husband, I felt that it was becoming too difficult for me to continue to operate a diner at the site without the assistance I used to receive during my husband's lifetime. I, therefore, decided it would be best to close the diner and seek an alternative source of income. My husband and I had always realized we owned a valuable property and we had often talked of the possibility of entering into a long term lease with a responsible party so as to insure income for ourselves in our retirement and to provide an estate for our children. Remembering my husband's advice that I should

never deal with a builder as they did not generally have the financial responsibility we desire and as they would often fold up their corporation leaving no security whatsoever he felt that a bank would be a most desirable tenant. Accordingly in 1960 I entered into an option agreement to lease the property to Chase Manhattan Bank, which I felt would provide me with the type of security I needed. Unfortunately, at that time the banking laws were such that Chase Manhattan Bank could not obtain approval to open a branch at the site and the option agreement was terminated. Thereafter, a real estate broker by the name of Frank Erickson approached me on behalf of the Franklin National Bank of Long Island. I was pleased by their offer as they were then a highly regarded suburban bank and they seemed to qualify in every respect with the advice my husband had given me. One day Mr. Erickson came over to my house with a binder agreement providing for a ground lease to Franklin National Bank, which among other things provided that I would not be required to subject my interest in the real property to any mortgages, and in my living room and in the presence of my two grandchildren, I signed the binder.

5. Thereafter, a lease was prepared by the bank's attorney and I was represented by an attorney named Joseph R. D'Arrigo. Before the lease was signed my son, Michael, became

concerned as to whether or not the transaction was going to be in my best interests. Michael spoke to Mr. Aspland of Sprague, Dwyer, Aspland & Tobin, who undertook to review the binder and draft lease prepared by the bank's attorney and to endeavor to protect my interests. Unfortunately, as I had signed a binder agreement, Mr. Aspland was unable to obtain any significant changes in the lease prepared by Andrew Magioncalda, the attorney for Franklin National Bank. Incidentally I later learned that Mr. D'Arrigo was sharing the brokerage commission with Mr. Erickson. I signed the lease with some doubts but felt that I had no alternative but to do so and at least felt secure in that I had obtained a bank as a tenant.

6. Thereafter, the lease was assigned several times by the Franklin National Bank and came into possession of Mr. Lever, who constructed a building on the property. This did not concern me as I was always in a position to look to the Franklin National Bank in the event of a default by Mr. Lever.

7. As discussed in the affidavit of James J. Milligan in support of this motion, the Franklin National Bank attempted several times to obtain modifications in the lease,

apparently at the request of Mr. Lever, as the documents were prepared by his then attorneys, Wolf & Diamond. These attempts occurred in 1962 and I was advised that the effect of the proposed changes would have been either to secure any mortgage of the Franklin National Bank lease with my real property or to provide that any bank which entered into a mortgage on the lease would have a right to cure any default made by the Franklin National Bank. I refused to consent to those proposals as I was pleased with my arrangement with Franklin National Bank and as I did not wish to in any way jeopardize my real property or relieve Franklin National Bank from its obligations as tenant.

8. After the building was constructed I received a letter from a corporation known as Woodmere Knolls, Inc., signed by Mr. Lever, enclosing assignments of the lease from Franklin National Bank to Mineola Office Building, Inc., and from them to Woodmere Knolls, as well as a document exercising the first two renewal options. The letter indicated that a mortgage had been entered into affecting the lease and requested that any notices from me be sent to the Queens County Federal Savings & Loan Association, which was the lender.

9. Thereafter, the ground rent which was due



and payable on March 1 for the next 12-month period, was paid by the bank and time passed without event until the fall of 1974. The demise of Franklin National Bank in the fall of 1974 was the subject of a great deal of publicity and discussion and I was uncertain as to the effect it would have upon their obligations to me. As I heard nothing from Franklin National Bank or from the European American Bank, which ostensibly took over operation of Franklin National Bank, I contacted my attorneys to seek their advice as to what the legal significance was of the Franklin National Bank situation. After obtaining a copy of the lease the Sprague firm commenced their review of the facts and the law involved. Before they could complete their study of the problem, on or about January 15, 1975, I received from Reliance Federal Savings & Loan the ground rent, in advance, for the period March 1, 1975 through the end of February, 1976. As I was reluctant to keep such a sizeable amount of money around in my apartment, I deposited the check and several days passed before I was able to speak with the Sprague firm. Shortly thereafter we met and I determined after receiving the advice of my attorneys, that a termination notice should be sent out causing the expiration of the lease based upon the fact that the Franklin National Bank had been adjudicated to be insolvent, was being liquidated

and, therefore, there was presently no individual or other entity whatsoever obligated under the terms of the lease and I had lost the security which I felt I had obtained when the Franklin National Bank became my tenant.

10. At the time I served the termination notice I tendered my check in repayment of the prematurely paid ground rent to the Reliance Federal Savings & Loan Association, which I am advised they rejected, and which was then returned again to the bank by my attorneys. At the time I received the check from Reliance Federal I was extremely surprised as it was not due until March 1st and as the time of payment was contrary to the past practices, when I would usually receive the rent a week or so before the due date rather than seven weeks before it was due.

11. At the time we commenced studying the problems created by the downfall of the Franklin National Bank, we felt there was no reason to rush any consideration of such a serious problem, particularly inasmuch as the ground rent for the 1974-1975 year had been paid long before Franklin's demise and as that term had not expired. When I received the check in January of 1975 I had not yet received a report from my attorneys and I was not then aware that a default had occurred under the



lease which would permit me to terminate the lease.

440-8

12. At present I am involved in two actions arising out of the insolvency of the Franklin National Bank. Prior to the commencement of this action, Mr. Lever began an action for a declaratory judgment against me, which is presently pending in Supreme Court, Nassau County. In that suit he also seeks a declaration that the termination notice served by me is void. My attorneys have answered the complaint and are prepared to proceed in that action. I am now involved in this litigation, which I find quite surprising, as I have not received one single communication from the Franklin National Bank, the European American Bank or the Federal Deposit Insurance Corporation, other than this law suit, since all the publicity about the Franklin National Bank in the fall. Now, all of a sudden, they are concerned, and apparently base their complaint upon public policy issues and claim to have standing to sue on the theory that if I succeed in terminating the ground lease, then a sub-lease of space presently used for a branch bank by European American might be jeopardized.

13. With respect to the first issue, I would think public policy would not override my intent when I made the

lease with Franklin National Bank, as I now have no security whatsoever. Should Mr. Lever default and should the building become derelict, Mr. Lever could determine to walk away from it, and I would have no one to look to for payment of the rent or damages. Furthermore, the European American branch bank is not in jeopardy as I have never threatened to terminate that sub-lease, or any other sub-lease of space in the building. It would appear to me that the Federal Deposit Insurance Company is being both precipitous and imprudent in thrusting itself into a dispute between Mr. Lever and myself based on assumed facts which have not occurred. In fact, the contrary is true. I do not intend to terminate the European American sub-lease, and I would be pleased to have them attorn to me if I am successful in my disputes with Mr. Lever. Had they had the courtesy to call me prior to the commencement of this action, I would have agreed to enter into an agreement with European American Bank & Trust Company, providing in essence that in the event that I was successful that I would not disturb them or terminate their sub-lease.

14. I am a widow, 67 years of age, and this property is my primary source of income and support and I took those steps necessary to protect my interest under the lease with

Franklin after I ascertained the true facts of the insolvency of Franklin on my own. The plaintiff did not assist me in my review of the facts so as to enable me to move more promptly and yet despite the fact they now claim waiver. Coincidentally, Mr. Lever makes the same claim in the action pending in the State Supreme Court, although at the same time he does not mention the motive behind his premature tender of the 1975-76 ground rent

15. For the reasons set forth in this affidavit and in the affidavit of Mr. Milligan annexed, I think it should be clear to the Court that the plaintiff's action is premature and does not present a case or controversy for determination by this Court. Moreover, I am advised by my attorneys that the temporary injunction should not issue as under the prevailing law my conduct and my position should be sustained.

*Jean M. Grella*  
JEAN M. GRELLA

Sworn to before me, this

*4<sup>th</sup>* day of March, 1975.

*Rose Gilbert*  
ROSE GILBERT  
NOTARY PUBLIC, State of New York  
No. 30-4513156  
Qualified in Nassau County  
Commission Expires March 30, 1977

Exhibit F Annexed to Affidavit of Susan L. Thorner  
(12 Cancelled Checks dated January 7, 1965 to January 14, 1975  
by Lawrence Lever)

A

px 20 765-73

BY SIGNATURE TWO CHECKS WHEN PAID IS ACCEPTED  
A FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE	AMOUNT
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2093

PAY TO THE ORDER OF Deanna County Federal Savings & Loan Association \$ 26.00

Twenty Six & 00/100 DOLLARS

Ten JAN 7 1965  $\frac{1-103}{210}$



**BANKERS TRUST CO.**  
BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y.

002100010310514074022211

000 2600000

BY ENDORSEMENT? THE CHECK WHEN PAID BY ACCEPTANCE  
IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE AUG 19 1967

**2092**

57

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**LETTERS**

44-38861-100

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**PLAYERS**

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**THE**

10/27/77

**155**

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**THE LEVER COMPANY**

**2092**

Jan 7 1965 F-103  
210

Balance \$15,875.11

10  
DOLLAR

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0001587510

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PAY TO THE ORDER OF  
 THE CHIEF REGISTRAR  
 JAMAICA  
 And to the order of  
 QUEBEC COURT SEEDS CO. LTD.  
 511 K.A.I. ASSOCIATED

JAN 11 1965  
 12-21

*Chen*

PAY TO THE ORDER OF  
 THE CHIEF REGISTRAR  
 JAMAICA  
 And to the order of  
 QUEBEC COURT SEEDS CO. LTD.  
 511 K.A.I. ASSOCIATED

JAN 11 1965 00205  
 3 37 120 5  
 NATION BANK  
 1-2

3643

[illegible]

**PAY  
TO THE  
ORDER OF**

January 2 1966  $\frac{1.103}{210}$

PAID TO THE ORDER OF Queen Elizabeth II - 100 - 1000000

DOLLARS



**BANKERS TRUST COMPANY**  
BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y.

5

01:02 10-0103285407402221

0000 21070006

5096

OF DEPOSITORS THIS CHECK WHEN PAID IS DEPOSITED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT		
DATE		AMOUNT
3	May 1968	6.00
4		
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6		
7		
8		
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10		
11		
12		

**THE LEVER COMPANY**

IN THE  
LONDON

January 5 1917  $\frac{1-100}{210}$

IN THE ORDER OF County of Cook, Ill. \$ 1000.00

DOLLARS



**BANKERS TRUST COMPANY**  
BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y.

5

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010010310540740222

1000 2 100000.

6569

[illegible]

**THE LEVER COMPANY**

**Δ**

1-103  
210

TO THE  
COMMISSIONER  
COUNTY FEDERAL DEPARTMENT OF LAND 82/1000

DOLLARS



**BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y.**

5

1-103

010210-010303-40740222

✓000 2 100000.

**THE LEVER COMPANY**

**No. 7771**

[illegible]

TO THE  
ORDER OF

$$\frac{1}{1} - 19 \frac{11}{210}$$

210

## Donna



**BANKERS TRUST COMPANY**  
BRIDGE PLAZA BLDG.  
LONG ISLAND CITY, N. Y. 11101

*Handwritten signature* (2)



1961

10 1 1332

THE CHASE MANHATTAN BANK  
NEW YORK, N.Y.  
100-111-1111

1964/81

THE CHASE MANHATTAN BANK  
NEW YORK, N.Y.

THE CHASE MANHATTAN BANK  
NEW YORK, N.Y.

THE CHASE MANHATTAN BANK  
NEW YORK, N.Y.

6451510 Grovco FEN

NATIONAL CITY BANK  
NEW YORK, N.Y.

RELIANCE FIDELITY & SECURITY  
LOAN ASSN OF NEW YORK  
100-111-1111

RELIANCE FIDELITY & SECURITY  
LOAN ASSN OF NEW YORK

IF INCORRECT PLEASE RETURN		
DATE	PARTICULARS	AMOUNT

A40-16

**THE LIVER COMPANY**

No. \_\_\_\_\_

1-103  
210

PAY TO THE ORDER OF Release Federal Savings & Loan S21,000 1921

**THE SUN 2100 DOLLARS**

DOLLARS



**BANKERS TRUST COMPANY**  
BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y. 11101 5

102100010310540740222

10002100000

IF INCORRECT PLEASE RETURN		
DATE	PARTICULARS	AMOUNT

**LEVER MANAGEMENT CORPORATION**

1001

PAY TO THE ORDER OF Release Federal Savings & Loan S21,000 11/2 1921

**THE SUN 2100 DOLLARS**

DOLLARS



**BANKERS TRUST COMPANY**  
BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y. 11101 5

10210001031054155335

10002100000

IF INCORRECT PLEASE RETURN		
DATE	PARTICULARS	AMOUNT

**LEVER MANAGEMENT CORPORATION**

202

PAY TO THE ORDER OF Release Federal Savings & Loan S21,000 11/2 1921

**THE SUN 2100 DOLLARS**

DOLLARS



**BANKERS TRUST COMPANY**  
BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y. 11101 5

102100010310054155335

10002100000

IF INCORRECT PLEASE RETURN		
DATE	PARTICULARS	AMOUNT
Jan 26/21	21,000.00	

**LEVER MANAGEMENT CORPORATION**

3023

PAY TO THE ORDER OF Release Federal Savings & Loan S21,000 January 4 1923

**THE SUN 2100 DOLLARS**

DOLLARS



**BANKERS TRUST COMPANY**  
BRIDGE PLAZA NORTH  
LONG ISLAND CITY, N. Y. 11101 5

102100010310054155335

A40-17

PAY ANY BANK OF THE UNITED STATES  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.

PAY ANY BANK OF THE UNITED STATES  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.

PAY TO THE ORDER OF  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.  
LOAN ASSOCIATION OF N. Y.  
THRU N. Y.  
CASHING

PAY ANY BANK OF THE UNITED STATES  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.

PAY TO THE ORDER OF  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.  
LOAN ASSOCIATION OF N. Y.  
THRU N. Y.  
CASHING

PAY ANY BANK OF THE UNITED STATES  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.

PAY TO THE ORDER OF  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.  
LOAN ASSOCIATION OF N. Y.  
THRU N. Y.  
CASHING

PAY TO THE ORDER OF  
FIRST NATIONAL CITY BANK  
NEW YORK, N. Y.

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED  
IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

LEVER MANAGEMENT CORP.

PX 13

1142

DATE Jan 26 1939 AMOUNT 264.01

Ground rent  
114 Old Country Rd.  
MINEROLA, N.Y.

IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY

PAY TO THE  
ORDER OF

Bellevue Federal Savings & Loan Association of N.Y.

2100

50-124  
214

EAST GARDEN CITY OFFICE  
**Long Island Trust Company**  
GARDEN CITY, N.Y.

LEVER MANAGEMENT CORP.

DOLLARS

# 2350

⑆0214⑆1063⑆⑆03⑆31256⑆8⑆

⑆000210000⑆

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED  
IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

LEVER MANAGEMENT CORP.

PX 12

1939

DATE 264.01 AMOUNT 210.00

Ground rent  
114 Old Country Rd.  
MINEROLA, N.Y.

IF INCORRECT PLEASE RETURN NO RECEIPT NECESSARY

PAY TO THE  
ORDER OF

Bellevue Federal Savings & Loan Association of N.Y.

210

50-1023  
214

**Long Island Trust Company**  
STEWART AVENUE & CLINTON ROAD  
GARDEN CITY, N. Y. 11530

DOLLARS  
LEVER MANAGEMENT CORP.

⑆0214⑆1063⑆⑆03⑆31256⑆8⑆

⑆000210000⑆

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8 1-120 8

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18

FIRST NATIONAL BANK  
RELAY FEDERAL SAVINGS &  
LOAN ASSN. OF N. Y.

1001 1000000000

PAY ANY BANK

P E G

NEW YORK

529

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525

PT-14

**RELIANCE FEDERAL SAVINGS AND LOAN  
ASSOCIATION OF NEW YORK**

69-61 162ND STREET  
JAMAICA, N. Y. 11432

S 23801

399

1-8

210

January 13 1975

R.F.S. \$21000 AND 00 CTS

\$ 21,000.00

MORTGAGE SERVICING ACCOUNT

Jean M. Grella  
20 Wendell Street  
Hempstead, N.Y. 11550



*Henry J. Lee*  
*William J. McKenna*

AUTHORIZED SIGNATURE

AUTHORIZED SIGNATURE

NATIONAL CITY BANK  
399 PARK AVENUE  
NEW YORK, N.Y. 10022

⑈023801⑈ ⑈0210⑈0008⑈ 00195936⑈

⑈0002100000⑈

Exhibit G Annexed to Affidavit of Susan L. Thorne  
(Affidavit of Jean M. Grella Dated July 3, 1975)



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

A 41

----- X  
LAWRENCE LEVER,

Plaintiff,

-against-

JEAN M. GRELLA and RELIANCE FEDERAL  
SAVINGS AND LOAN ASSOCIATION OF  
NEW YORK,

Defendants.  
----- X

AFFIDAVIT IN SUPPORT  
OF DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

STATE OF NEW YORK )

: ss.:

COUNTY OF NASSAU )

JEAN M. GRELLA, being duly sworn, deposes and says:

1. I am a defendant in this action, have personal knowledge of all the facts connected with it, and make this affidavit in support of my motion for summary judgment.
2. This action was brought for a declaratory judgment, and for other relief, but my attorneys inform me that the other relief is so tied into the declaratory judgment request that they will stand or fall together. The declaration sought is to adjudge the

Exh. 1 + 2

rights of the parties resulting from a notice of termination of a ground lease served by me based on the insolvency of Franklin National Bank. The lease was made by me to Franklin National Bank of Long Island on April 4, 1961, and a copy of the lease is attached to the complaint. The lease covered property on the north side of Old Country Road, Mineola, which is now known as 114 Old Country Road.

3. I am now a widow, 68 years of age, but for many years my husband and I operated a diner in Mineola, and lived in a house which was located on the property involved in this action. Many years ago we moved the diner onto the property and located it directly in front of our home, and both lived and earned our living there.

4. After the death of my husband, I felt that it was becoming too difficult for me to continue to operate a diner at the site without the assistance I used to receive during my husband's lifetime. I, therefore, decided it would be best to close the diner and seek another source of income. My husband and I had always realized we owned a valuable parcel of property and we had often discussed the possibility of entering into a long term lease with a responsible tenant so as to insure income for ourselves in our retirement, and to provide an estate for our children. Remembering my husband's advice that I should never deal with a builder as builders

did not generally have the financial responsibility we desired, and as they would often use dummy corporations providing no security whatsoever, I felt that a bank would be a most desirable tenant. Accordingly in 1960 I entered into an option agreement to lease the property to Chase Manhattan Bank, which I felt would provide me with the type of security I needed. Unfortunately, as I understand it, at that time the banking laws were such that Chase Manhattan Bank could not obtain approval of the Banking Department to open a branch at the site, and the option agreement was terminated.

5. Thereafter, a real estate broker by the name of Frank Erickson approached me on behalf of the Franklin National Bank of Long Island with a proposal to lease the property. I was pleased by the bank's offer as it was then a highly regarded and active bank, and it seemed to qualify in every respect with the advice my husband had given me. In due time, Mr. Erickson came over to my house with a binder agreement providing for a long term ground lease to Franklin National Bank, which among other things provided that I would not be required to subject my fee estate in the real property to any mortgage, and in my living room and in the presence of my two grandchildren, I signed the binder.

6. Thereafter, a lease was prepared by the bank's

attorney. I was supposedly being represented by an attorney named Joseph R. D'Arrigo. Before the lease was signed, my son, Michael became concerned as to whether or not the transaction was going to be in my best interests. My son spoke to Mr. Michael P. Aspland, who undertook to review the binder and draft lease prepared by the bank's attorney Andrew Magioncalda, and to endeavor to more adequately protect my interests. Unfortunately, as I had signed a binder agreement containing the essential terms, Mr. Aspland was unable to obtain significant changes in the lease. I later learned that Mr. D'Arrigo was sharing the brokerage commission with Mr. Erickson. I signed the lease with some doubts as to the fairness of its terms to me, but felt that I had no alternative, and at least felt secure because I had obtained a bank as a tenant.

7. After the present office building was constructed in 1965, I received a letter from a corporation known as Woodmere Knolls, Inc., signed by the plaintiff Lever, enclosing copies of assignments of the lease from Franklin National Bank to Mineola Office Building, Inc., and from that corporation to Woodmere Knolls, as well as a document purporting to exercise the first two renewal options granted in the lease. The letter indicated that a mortgage had been made covering the lease, that the lease had also been assigned to the

Queens County Federal Savings & Loan Association, and requested that any notices by me be sent to that institution.

8. Thereafter, the ground rent which was due and payable on March 1 for each succeeding 12-month period, was paid by checks of Queens County or its successor, Reliance Federal.

9. The financial difficulties of Franklin National Bank in the fall of 1974 were the subject of a great deal of newspaper publicity and I was uncertain as to the effect the bank's problems would have upon its obligations to me. As I heard nothing from Franklin National Bank or from the European-American Bank, which according to newspaper reports took over the operation of Franklin National Bank, I contacted my attorneys in the winter of 1974/75 to seek their advice as to what the legal significance was of the Franklin National Bank situation.

10. Before they could complete their study of the problem, on or about January 15, 1975, I received from Reliance Federal Savings & Loan the ground rent, in advance, for the period March 1, 1975 through the end of February, 1976. As I was reluctant to keep a bank check for such a sizeable amount of money around in my apartment, and was unable to contact my attorney, I deposited the check

I failed to inform my attorneys about the receipt of the check until I met with them some time later. After receiving their advice that Franklin had been declared to be insolvent, on February 3, 1975, I returned the tendered rent to Reliance (before its due date) and served a termination notice based on Franklin's insolvency.

11. At the time we were studying the problem created by the downfall of the Franklin National Bank, my attorneys and I felt there was no reason to rush consideration and decision of such a serious matter, particularly because the ground rent for the 1974-1975 year had been paid long before Franklin's demise, and that lease year term had not yet expired. When I received the check in January of 1975 I had not yet received a report from my attorneys, and I was not then aware that Franklin had been declared insolvent and that legally a default had occurred under the lease which would permit me to terminate it.

12. After the service of the termination notice, the plaintiff instituted this action. The defendant Reliance in its answer asserts cross-claims against me. I am informed by my attorneys and verily believe that the complaint and cross-claims do not state causes of action, and I believe that there is no merit to them.



13. I believed, on my attorneys' advice, that the insolvency of Franklin was a default under the lease, that there was no person or corporation contractually liable to me on the covenants and agreements contained in the lease, which was my principal source of income, and in good faith I served the notice of termination. I therefore respectfully ask for summary judgment as demanded in the annexed notice of motion.

Jean M. Grella  
JEAN M. GRELLA

Sworn to before me this

3 day of July, 1975.

James J. Milligan

JAMES J. MILLIGAN  
Notary Public, State of New York  
No. 30-2718303 Qual. in Nassau County  
Commission Expires March 30, 1977



**Affidavit of W. Norman Davis in Support of  
Plaintiff's Motion for Summary Judgment**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 48

----- x  
FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

75 C. 276  
(O.G.J.)

-against- :

JEAN M. GRELLA, LAWRENCE LEVER, and :  
LEVER HOLDING CORP., :

Defendants. :

AFFIDAVIT

----- x  
STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

W. NORMAN DAVIS, being duly sworn, deposes and says:

1. I am an Associate Liquidator of Federal Deposit Insurance Corporation ("FDIC"). I make this affidavit in support of FDIC's motion for summary judgment in this action and I have knowledge of the facts stated herein.

2. FDIC is a government agency existing under and by virtue of an act of Congress (12 U.S.C. §§ 1811-1831) and is expressly authorized by Congress to sue (12 U.S.C. § 1819). One of FDIC's functions is to insure depositors up to the present statutory maximum of \$40,000. FDIC insures depositors in virtually all commercial banks and nearly two-thirds of the mutual savings banks in the United States. FDIC's insurance fund is supported in part by assessments on the deposits of insured banks.

3. When a national bank is declared insolvent and FDIC is appointed receiver, FDIC has two principal courses of action open to it: It may pay claims of depositors up to the statutory maximum and be subrogated to those claims against the closed bank, or it may enter into a transaction in which a healthy bank purchases assets and assumes liabilities of the closed bank.

4. A purchase and assumption transaction is generally preferable to an insurance pay-out to depositors. The pay-out alternative usually involves a week to ten days of preparation by FDIC after the bank is closed, during which period insured depositors are deprived of the use of their moneys on deposit, and millions of dollars worth of checks in the process of collection are returned unpaid. In addition, depositors whose deposits exceeded the statutory maximum of FDIC insurance would be deprived of the use of some of their money until the liquidation process had generated sufficient funds for the payment of dividends; since these depositors would share ratably with other creditors they might never recover in full. The purchase and assumption alternative, on the other hand, safeguards all of the depositors' funds, ensures that depositors have continuous access to their funds, avoids any interruption of the check collection process, and generally prevents loss of public confidence in the banking system. FDIC is empowered to enter into a purchase and assumption transaction whenever it judges that the adoption of that alternative will avert or reduce the risk of loss to the FDIC insurance fund.

5. When a purchase and assumption transaction is contemplated, FDIC requests bids from interested banks. In bidding, banks in effect offer to pay a premium that represents principally their estimate of the value to them of the to-be-closed bank's business as a going concern. When a bidding bank has had no branches in the geographical area served by the to-be-closed bank, an essential element in its willingness to bid and in the amount of its bid is the ability to serve the customers of the to-be-closed bank

without interruption. The greater the continuity of service, the greater chance the bidding bank has to retain the customers served by the to-be-closed bank. For a "new" bank, this important continuity factor requires servicing customers in the same location as the old bank. In evaluating the prospects of continuity interested banks review the leases of the to-be-closed bank to determine whether there are provisions that could result in cancellation or forfeiture of the lease.

6. In the case of FNB, as to which FDIC was appointed receiver on October 8, 1974, FDIC received bids from four banks: First National City Bank, Manufacturer's Hanover Bank, Chemical Bank, and European-American Bank ("EAB"). The highest bid was \$125 million, submitted by EAB, which of all the bidding banks had the least penetration into the New York area banking market. Prior to October 8, 1974, EAB had no branches in Nassau and Suffolk Counties, where FNB had most of its 104 branch offices.

7. The lease in question in the present action contains a paragraph in clear and unambiguous language, giving the landlord the power to terminate the lease upon the occurrence of certain specific events, none of which occurred with respect to FNB: FNB never filed a petition in bankruptcy or arrangement, nor was such a petition ever filed against FNB; FNB was never adjudicated a bankrupt; nor did it make an assignment for the benefit of creditors or take advantage of any insolvency act.

8. If unambiguous language in leases is to be amended by construction to permit the landlord to declare a default on the happening of an event not encompassed by the language of the lease, FDIC's purchase and assumption alternative may well fall into disuse - either because healthy banks may become unwilling to enter into such transactions when reasonable expectations as to continuity can so easily be defeated, or because willing banks may so reduce the amount of their bids as to make the purchase and assumption route just as costly to FDIC as the insurance pay-out route.

Sworn to before me this

2nd day of February , 1976



W. Norman Davis,  
Associate Liquidator

  
Notary Public

GERTRUDE W. WOLF  
Notary Public, State of New York  
No. 31-4602990  
Qualified in New York County  
Commission Expires March 30, 1978

**Affidavit of Lawrence Lever in Support of  
Plaintiff's Motion for Summary Judgment**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 52

----- x  
FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

75 C. 276  
(O.G. .)

-against- :

AFFIDAVIT

JEAN M. GRELLA, LAWRENCE LEVER, and  
LEVER HOLDING CORP., :

Defendants. :  
----- x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

LAWRENCE LEVER, being duly sworn, deposes and says:

1. I am a real estate developer and am the present assignee of the lease (the "Ground Lease") between Jean M. Grella and Franklin National Bank ("FNB") whereby Grella leased certain property in Mineola, Long Island (the "Ground") to FNB. I make this affidavit in support of the motion of plaintiff Federal Deposit Insurance Corporation as receiver of FNB for summary judgment in this action, and I have knowledge of the facts stated herein.

2. On January 7, 1964 a building permit was issued to Old Country Road Building Corporation, which is wholly owned by me for the construction of an office building on the Ground. The building was completed in June 1965. The cost of construction was \$1,315,472.22, and the building, exclusive of the Ground, is now worth \$3.5-4.5 million.

3. I have never filed a petition in bankruptcy or arrangement, nor has such a petition ever been filed against me. I have never been adjudicated a bankrupt, I have never



made an assignment for the benefit of creditors, and I have never performed any act of insolvency or taken advantage of any insolvency act.



Lawrence Lever

Sworn to before me this

31<sup>st</sup> day of January, 1976.



Notary Public

ERROL L. LUPOV  
Notary Public, State of New York  
No. 30-762527's  
Certified in Nassau County  
Term Expires March 30, 1976

Affidavit of Jean M. Grella in Opposition to  
Plaintiff's Motion for Summary Judgment

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 54

----- X

FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

-against- :

JEAN M. GRELLA, LAWRENCE LEVER and  
LEVER HOLDING CORP., :

Defendants. :

75 C. 276

(O.G.J.)

AFFIDAVIT IN  
OPPOSITION TO  
PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT

----- X

STATE OF NEW YORK )

: ss.:

COUNTY OF NASSAU

JEAN M. GRELLA, being duly sworn, deposes and says:

1. I am one of the defendants in the within action  
and make this affidavit in opposition to the plaintiff's motion  
for summary judgment.

2. In 1961 I entered into a ground lease with the  
Franklin National Bank of Long Island which provided for a long  
term lease by Franklin of real property owned by me on Old Country  
Road in Mineola, New York. The lease was prepared by the attorney

for Franklin National Bank and was entered into by me in reliance upon the financial stability of Franklin. The details and history of that transaction were discussed in my prior affidavits submitted in both this Court and in the Supreme Court of Nassau County, both of which are annexed to the moving papers as Exhibits E and F. In view of the prior recitation of those facts the Court's attention is directed to those exhibits for specifics. However, I think it is important to emphasize that at the time I entered into the ground lease I would not have done so had I for a minute expected that the Franklin National Bank would fail. In fact, Franklin National Bank has failed, and thereby defeated one of the essential elements of the bargain which was negotiated between myself and Franklin, as tenant.

3. A great deal has been made in this Court and in the State court about the strong public policy under which the FDIC claims that it had a right to interfere with the terms of my lease with Franklin National Bank, which lease is presently owned by Lawrance Lever, as assignee. Both plaintiff and Lever recite a great many facts with respect to conduct, acts or agreements between Mr. Lever, Franklin National Bank or some of Mr. Lever's corporations. It should be clear that agreements between, or acts performed by,

Lever or his corporations or the bank, have no relevancy whatsoever to the issue before this Court, and are apparently being used by the FDIC and Lever merely to obscure the real issue. The fact that Lever or his corporations attempted to exercise renewal options, constructed a building, or assigned and reassigned the lease is not relevant. All of those acts were unilateral acts which did not require my consent, and which both Lever and the bank were free to perform without obtaining my consent. On the other hand, the lease agreement between myself and Franklin National Bank is a two-party agreement which could not be changed or modified without my written consent and no one has alleged that I consented in writing to any modification or amendment of the lease.

4. I have read the affidavit of Mr. Davis submitted in support of the motion for summary judgment, which affidavit discusses at length the functions of the FDIC, and briefly its agreement with European-American Bank. Nowhere in the affidavit does Mr. Davis indicate that either the FDIC or its insolvent Franklin has any interest in the ground lease. It would appear from paragraph "8" of the Davis affidavit, that he is not concerned with the particular action before the Court, but is instead looking for an advisory opinion.

5. Despite all the papers submitted to date by the lawyers for the FDIC, I have not been contacted by European-American Bank, nor have the plaintiff's attorneys submitted any documents from the European-American Bank indicating that that bank has agreed to purchase from the FDIC the branch bank located within the building on my property. Instead, we have received vague, broad assertions from the plaintiff's attorneys which are made upon assumptions, surmises or information and belief. I think the foregoing should clearly indicate to the Court that the plaintiff has no standing to sue, and cannot even sustain its remote claim of standing (based upon the branch bank lease with Lever) which my attorneys advise me is no standing at all.

6. It is submitted that the issue to be adjudicated is a matter of construction of a lease of real property, and that the proper forum for that determination is the Supreme Court of Nassau County, where an action is presently pending. That action was commenced prior to the institution of this action by the FDIC.

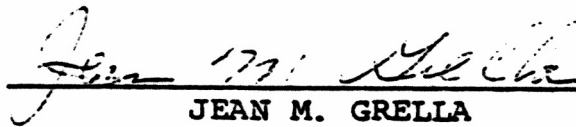
7. For the reasons stated, it is respectfully submitted that plaintiff's motion for summary judgment should be denied, and its complaint dismissed, or alternatively that the Court determine that the ground lease was validly terminated. In making

this determination, it is suggested that the Court should clearly distinguish between my ground lease of which Mr. Lever is presently the assignee (with which the FDIC has no right to interfere), and the branch bank lease between Mr. Lever and Franklin National Bank, which is now held by the FDIC as receiver. I do not dispute that this Court may have authority to enjoin Mr. Lever from interfering with the branch lease temporarily. It has never been my intention to interfere with the branch bank operation. I have never attempted to terminate that lease, and as I have offered before, I would gladly enter into any formal arrangement necessary to assure the FDIC of that fact.

8. I agree that there is no genuine issue of fact presented. The issues are only of law for the Court, and they are (a) subject matter jurisdiction; (b) the standing of the plaintiff to sue; (c) whether there exists a ripe controversy between the plaintiff and me presenting for determination a substantial Federal question, and if the Court decides those questions in plaintiff's favor; (d) a construction of the lease according to the law of the State of New York, which will result in a determination that the tenant referred to in clause 10 of the ground lease is Franklin, that the declaration of Franklin's insolvency by the Comptroller

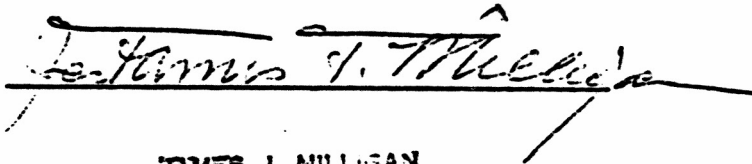


was an event of default provided for, and that I rightfully terminated the ground lease.

  
JEAN M. GRELLA

Sworn to before me this

20th day of February, 1976.



JAMES J. MILLIGAN  
Notary Public, State of New York  
No. 30-271-800 Queens County  
Commission Expires March 30, 1977

Statement Under R9 (g) of the General Rules of the United  
States District Court for the Eastern District of New York  
in Opposition to Plaintiff's Motion for Summary Judgment

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 60

----- X

FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

-against- :

75 C. 276

(O.G.J.)

JEAN M. GRELLA, LAWRENCE LEVER, and :  
LEVER HOLDING CORP., :

Defendants. :

----- X

STATEMENT UNDER RULE 9(g) OF THE  
GENERAL RULES OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF NEW YORK

The following facts are submitted in controversion of  
the statement made by the plaintiff pursuant to Rule 9(g).

The parenthetical references are to the paragraphs of  
plaintiff's statement.

1. (Plaintiff's 1). Plaintiff FDIC may have statutory  
authorization to sue in its own right. Plaintiff does not, as  
Receiver of Franklin, based upon the subject matter of the action,  
have standing to sue. There is no justiciable controversy between

the plaintiff and defendant Grella present, and the plaintiff's claims are not ripe. Franklin sold the ground lease to Mineola Office Building, Inc. in 1964, and the FDIC as Receiver of Franklin, has no interest in the ground lease.

2. (Plaintiff's 2). Grella resides at 135 Third Avenue, Mineola, New York. As of April 4, 1961, Grella was the owner of certain land in Mineola, New York, located on the north side of Old Country Road, which was then improved with a diner and accessory structures.

3. (Plaintiff's 8). Grella tendered the return of the ground rent for the year 1975-1976 prior to its due date (March 1st, 1975). Tender was rejected by the defendant Lever, and Grella returned the tendered rent for the year 1976-1977.

4. (Plaintiff's 18). Franklin was declared to be insolvent by the Comptroller of the Currency and is presently in the process of being liquidated. That situation constitutes insolvency as a matter of fact and as a matter of law, and accordingly Franklin as tenant, took advantage of an insolvency act.

DEFENDANT GRELLA'S STATEMENT OF ADDITIONAL  
FACTS PURSUANT TO RULE 9(g)

The following facts are submitted by the defendant Grella

as material facts as to which there is no genuine issue to be tried.

5. The ground lease between Grella and Franklin was prepared by Andrew Magioncalde<sup>2</sup>, Franklin's house counsel.

6. The ground lease was entered into by Grella in reliance upon the then financial condition of Franklin as a highly regarded financial institution.

7. Nobody has ever assumed any of the obligations of Franklin as tenant under the ground lease, and as a result of the failure of Franklin, the defendant Grella has lost the security which she bargained for in selecting Franklin as a tenant.


Dated: Mineola, New York

February 20, 1976.

Yours, etc.,

SPRAGUE, DWYER, ASPLAND & TOBIN, P.C.

By :



A Member of the Firm  
Attorneys for Defendant  
JEAN M. GRELLA  
200 Old Country Road  
Mineola, New York 11530  
516-746-5700

Supplemental Affidavit of Robert P. Lynn, Jr. in  
Opposition to Plaintiff's Motion for Summary  
Judgment

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 63.

- - - - - X

FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :  
Plaintiff, :

75 C. 276

-against-

(O.G.J.)

JEAN M. GRELLA, LAWRENCE LEVER and :  
LEVER HOLDING CORP., :  
Defendants. :

SUPPLEMENTAL AFFIDAVIT  
IN OPPOSITION TO  
MOTION FOR SUMMARY  
JUDGMENT

- - - - - X

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NASSAU )

ROBERT P. LYNN, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Sprague, Dwyer, Aspland & Tobin, P.C., attorneys for the defendant Grella in the within action and I make this affidavit in opposition to the plaintiff's motion for summary judgment.

2. Almost one year ago at the time of the hearing and oral argument on the plaintiff's application for a preliminary injunction, I advised the court that to insure the continuity of banking, that Mrs. Grella would agree to enter into a non-disturbance



agreement with European-American Bank and Trust Company (see transcript of hearing on March 4, 1975 at page 91; copy annexed as Exhibit "1"). Amalya Kearse, Esq., counsel for the plaintiff in the within action rejected the concept of a non-disturbance agreement (transcript page 84 - Exhibit "2" hereto). Thereafter, the court granted plaintiff's application for a preliminary injunction but expressly authorized the defendant Grella to proceed in the pending action in state court.

3. Subsequently I transmitted a draft of a proposed non-disturbance agreement to Miss Kearse, with a copy to the court to show that our client's offer was made in good faith and in hopes that such a resolution would result in the termination of the instant action. By letter dated April 9, 1975 (Exhibit "3") Amalya L. Kearse, Esq. again rejected the offered non-disturbance agreement upon the vague theory that Mrs. Grella did not have authority to grant same. Thereafter, on April 11, 1975, I wrote Miss Kearse clearly and unequivocally setting forth our opinion that Grella was possessed of full authority to enter into such an agreement. (See Exhibit "4").

4. The plaintiff has now moved for a permanent injunction broader in scope than the preliminary grant. The injunction, if granted, would permanently restrain Grella from terminating the

ground lease and would summarily determine issues which are pending in the state court, and to which the F.D.I.C. is not a party and has no interest. The plaintiff's claim of standing, interest and the existence of a case or controversy is based upon a broad claim of public policy. In essence, that claim is that Mrs. Grella's conduct may result in an unwillingness of other banks in the future to purchase branch banks from an insolvent estate and therefore the continuity of banking will be disturbed. Secondly, the F.D.I.C. alleges that if Grella were to succeed the continuity of banking at this particular location may be jeopardized. I submit that as a matter of fact, both of the foregoing claims are specious and in direct contradiction of the procedures and course of conduct heretofore adopted by both the F.D.I.C. and European-American Bank.

5. Subsequent to the March 4, 1975 hearing and the foregoing exchange of correspondence and in the course of my representation of other clients, I have had occasions to review agreements (see Exhibit "5") submitted on behalf of European-American Bank. These agreements were presumably proposed to effectuate European-American Bank's agreement with the F.D.I.C. In each case those agreements were submitted to my client by Howard Smith of Cushman & Wakefield.

In the course of my review of the agreements, I had occasion to speak with Mr. Smith, who advised me that the same agreements were proposed for all Franklin locations. Essentially the agreement provided for the approval by the landlord of the assignment of the lease to European-American from the F.D.I.C. Additionally, the agreement provided for certain modifications of the lease which are not important to the issues at bar. However, the agreements then provided that the landlord should use its best efforts to obtain a non-disturbance agreement from any present mortgagee or ground lessor. The specific language is as follows:

"TENTH: Landlord covenants and agrees that any underlying lease or mortgage hereafter placed upon the Demised Premises to which this Lease shall be subordinate, shall provide that if by dispossession, foreclosure or otherwise, such holder or any successor in interest shall become the owner of the Demised Premises, or take over the rights of Landlord in the Demised Premises, it will not disturb the possession, use or enjoyment of the Demised Premises by Tenant, its successors or permitted assigns, nor disaffirm this lease or Tenant's rights or estate hereunder, so long as all of the obligations of Tenant are fully performed in accordance with the terms of this Lease. Landlord will also use its best efforts to obtain from the holders of any underlying lease or mortgage to which this Lease is subordinate as of the date hereof a "non-disturbance" agreement similar to the above. It is expressly understood, however, that Landlord's obligation pursuant to the preceding sentence is not a condition of this Lease and that the inability to obtain same shall in nowise affect the validity of this Lease or Tenant's obligation thereunder in any respect whatsoever."

On behalf of our client we have absolutely offered to grant a non-disturbance, yet our offer was rejected by the F.D.I.C. and they are apparently seeking more on this motion than the real party in interest (European-American) bargained for and was satisfied with. Inasmuch as I was advised by Howard Smith that all landlords of Franklin received the agreement (Exhibit "5") it is submitted, upon information and belief, that Lawrence Lever has been asked to execute a similar document. Interestingly, despite the requirement that Lever as landlord use his best efforts to obtain a non-disturbance agreement, no one has ever asked us or Mrs. Grella for such an agreement.

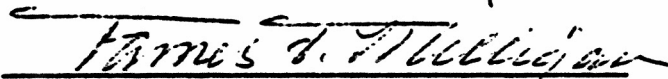
Based upon the agreement submitted by European-American Bank (Exhibit "5") and my discussions with Howard Smith, it would appear that they have made a business decision that the risks of dispossession by a fee owner or mortgagee are not substantial and therefore they only require best efforts to obtain a non-disturbance. Considering that in light of our offer to absolutely grant a non-disturbance, I do not understand the position taken by the counsel to the F.D.I.C. It is submitted that based upon the foregoing, that: no factual issue exists; no controversy exists; no standing exists and that we are ready, willing and able to grant to European-American all that they are contractually entitled to from any mortgagee or ground lessor.

6. Based upon the foregoing, it is submitted that as a matter of fact and a matter of law, the motion must be denied and the complaint dismissed.



ROBERT P. LYNN, JR.

Sworn to before me this  
24th day of February, 1976.



JAMES J. SULLIVAN  
Notary Public, State of New York  
No. 30-2718309  
Commission Expires March 30, 1977

Exhibits 1 and 2 Annexed to Affidavit of Robert P. Lynn, Jr.

(Page 91 of Transcript of Hearing dated March 4, 1975 and

Page 84 of Transcript of Hearing)

1  
DS:GA  
T5R3PY

MR. LYNN: I think counsel perhaps has not focussed as fully on the problem as they should. Had they done that, they would find they have no problem at all.

What Mrs. Grella says is that apparently Mr. Lever has made a favorable deal with the European American Bank. And should she succeed in her litigation, which is now pending, your Honor, in the State Supreme Court in Nassau County, where there is an action brought with the same defendants here, with the exception of the FDIC, and to which we submitted an answer, and we are at issue, ready to proceed in that action. And she is in the position of basically as a landlord on the ground lease, the same thing as any mortgagee, your Honor, if you go into a sophisticated building in New York City, and there is a mortgage on there, and you are a responsible tenant, you sign the lease, and you say, Look, I want a non-disturbance from the mortgagee, saying if they foreclose, they won't terminate, since they have a right to do it.

What we are saying is, if we succeed in our fight with Mr. Lever, okay, then we will not terminate your tenancy. We have a right to do that. And it is not impossible, whatsoever. And in the interim, if they haven't made a favorable deal with Mr. Lever, then what

EXHIBIT "I"



DS:GA  
TSR2 PM2

1 THE COURT: If I were to continue the restrain-  
2 ing order, or temporary injunction, until Mrs. Grella,  
3 if she is so minded, submits some formal instrument  
4 that would assure European American of its remaining  
5 in possession of its banking quarters there on Old  
6 Country Road, what further interest does the receiver  
7 really have? ✓

8 MS. CURIS: Well, your Honor, I would point out  
9 that in her motion today Mrs. Grella points out that  
10 as to the sub-lease of the branch office space, she  
11 has no interest whatsoever. I do not think that she  
12 has the power to assure European American or the re-  
13 ceiver continued occupancy of the sub-lease. What she  
14 has asked in her notice of termination is that -- the  
15 notice of termination -- and asks that the persons  
16 noticed were to meet with her attorneys to discuss turn-  
17 ing over the premises to her.

18 THE COURT: Well, Mr. Lynn -- Mr. McIligan said  
19 it didn't really mean turning over the banking quarters,  
20 but it meant turning over the ground lease. That she  
21 will let them stay, I presume, under the terms of the  
22 present sub-lease. It says if they attorn -- whether  
23 she has the right to make them attorn, I don't know.  
24 We have a situation here where part of the controversy  
25 practically belongs in the State Court except as you

EXHIBIT "2"

Exhibits 3 and 4 Annexed to Affidavit of Robert P. Lynn, Jr.  
(Letter Dated April 9, 1975 from Amalya L. Kearse to Robert  
P. Lynn, Jr. and Letter dated April 11, 1975 from Robert P.  
Lynn, Jr. to Amalya L. Kearse)

*Hughes Hubbard & Reed*  
*One Wall Street*  
*New York 10005*

A 71

JOHN S. ALLEE  
ARL H. BAUM  
GEORGE A. DAVIDSON  
EDWARD S. DAVIS  
JOHN A. DONOVAN  
JOHN WESTERBROOK FAGER  
JOHN C. FONTAINE  
JAMES W. GIDDENS  
THOMAS GURDY  
ALLEN S. HUBBARD  
ALLEN S. HUBBARD, JR.  
ED KAUFMAN  
ANALYS L. KEARSE  
RICHARD A. KINSALL, JR.  
PHILIP A. LACOMARA  
MARTIN E. LOWY

ALAN H. MILEAN  
SAMMAN A. ORVETZ  
OTIS PERRY PEARSON  
HOWELL PERKINS  
HENRY PLESNER, JR.  
EDWARD S. ROBINSON  
JEROME I. ROSENBERG  
ROBERT SCHOFF  
ORVILLE H. SCHILL  
THOMAS G. SCHUELLER  
JEROME S. SHAPIRO  
ROBERT J. SISA  
ROSLAND STEBBINS, JR.  
L. HOMER SURBERG  
DAVID R. TILLING-AST  
JOSEPH TRACHTMAN

312 WHITEHALL 3-6500  
CABLE: HUBBARD NEW YORK  
TELEX: 12-6557

1600 L STREET, N. W.  
WASHINGTON, D. C. 20036  
202-672-6250

515 SOUTH FLOWER STREET  
LOS ANGELES, CALIFORNIA 90071  
213-489-5140

MARINE PLAZA  
MILWAUKEE, WISCONSIN 53202  
414-271-6627

9, RUE QUENTIN-BAUCHART  
75008 PARIS  
225-38-01

ADMITTED IN CALIFORNIA ONLY  
ROBERT A. SCHLEI

April 9, 1975

Robert P. Lynn, Jr., Esq.  
Sprague, Dwyer, Aspland  
& Tobin, P.C.  
220 Old Country Road  
Mineola, New York 11501

Re: FDIC v. Grella et al.

Dear Mr. Lynn:

I am in receipt of your letter dated March 24, 1975 which offers a non disturbance agreement to European-American Bank and Trust Company ("EAB") in consideration of a discontinuance with prejudice by the Federal Deposit Insurance Corporation ("FDIC") of its action pending in the United States District Court for the Eastern District of New York. Your client's offer is not acceptable to the FDIC, in part because, for reasons brought out at the hearing before Judge Judd on March 4, 1975, there is no assurance that the undertakings offered could in fact be carried out by Mrs. Grella.

Very truly yours,

*Analyse L. Kears*

cc: Hon. Orrin G. Judd

EXHIBIT "3"

April 11, 1975

C  
O  
P  
Y

Amalya L. Kearsse, Esq.  
Hughes Hubbard & Reed  
One Wall Street  
New York, New York 10005

Re: F.D.I.C. vs Grella, et al

Dear Miss Kearsse:

We are in receipt of yours of April 9th last and wish to clarify our suggestion as it appears you may have misconstrued it.

It is our opinion that Mrs. Grella is possessed of full power to grant your client and/or European-American Bank a nondisturbance agreement which would provide that Mrs. Grella would not take any action to disturb their occupancy or lease of the bank premises. The foregoing was the extent of our offer, and you may have every assurance that such an agreement is and would be as valid and binding as any other contract.

If the reason for your uncertainty is the fact that such an agreement, while protecting your client and European-American Bank from any possible jeopardy from Mrs. Grella, would not secure the bank premises from any action by Lever or Reliance, you are correct. However, we made no offer, and would have no authority to make any offer on behalf of either Lever or the bank.

Moreover, it would seem that if the foregoing was your reason, then perhaps the FDIC might have a controversy with Lever or Reliance, but that is a matter which should be separate and apart from Mrs. Grella. Also, it was my

EXHIBIT "4"

Amalya L. Kearse, Esq.  
Hughes Hubbard & Reed

-2-

April 11, 1975

understanding from your pleadings and the testimony that Lever was willing to approve an assignment of the branch lease to European-American Bank and that our client's action presented a threat to the public policy supporting a speedy and smooth transition of this banking location from a Franklin National Bank branch to a European-American branch. If the content of your pleadings were true, it would seem we have provided a resolution of the problem favorable to the FDIC.

We trust the foregoing clarifies Mrs. Grella's position and offer, and would appreciate receiving an unambiguous statement as to the position of the FDIC.

Very truly yours,

Robert P. Lynn, Jr.

RPL/mb

cc: Hon. Orrin G. Judd

C  
O  
P  
Y

Exhibit 5 Annexed to Affidavit of Robert P. Lynn, Jr.  
(Lease Modification Agreement Dated January 31, 1975 Between  
General Properties, Inc., and European-American Bank & Trust  
Company)

LEASE MODIFICATION AGREEMENT, dated as of the 31<sup>st</sup> day of January, 1975, between Gensel Properties, Inc., a New York corporation having its principal place of business at 550 Jericho Turnpike, Mineola, New York (hereinafter called "Landlord") and European-American Bank & Trust Company, a New York trust company, having its principal place of business at 10 Hanover Square, New York, New York (hereinafter called "E-A").

WHEREAS, Landlord, as lessor, and Franklin National Bank ("Franklin"), as lessee, were parties to a certain lease, dated the 1st day of July, 1973 (the "Lease") regarding premises located in the building known as 520 Jericho Turnpike, (Herricks Rd.), Mineola, New York (the "Demised Premises");

WHEREAS, Franklin was declared insolvent by the Comptroller of the Currency on October 8, 1974;

WHEREAS, the Comptroller of the Currency, in accordance with 12 U.S.C. § 191 and 12 U.S.C. § 1821(c), has appointed the Federal Deposit Insurance Corporation to act as receiver (the "Receiver") of Franklin;

WHEREAS, E-A has indicated its willingness to acquire the rights, title and interest of Franklin in and to the Lease;

WHEREAS, the Receiver, as Assignor, and E-A, as Assignee, are concurrently entering into an Assignment and Assumption Agreement wherein this Lease is being assigned by the Receiver, as Assignor, to E-A, as Assignee, and E-A has assumed all obligations of Tenant thereunder accruing on and after October 8, 1974;

WHEREAS, Landlord has consented to said Assignment and Assumption Agreement; and

WHEREAS, Landlord and E-A are desirous of amending and modifying the Lease only in the respects hereinafter stated.

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

FIRST: Landlord acknowledges that effective as of October 8, 1974, E-A has succeeded to the interests of Franklin under the Lease and will thereafter be referred to and accorded all the rights and privileges conferred upon the "Tenant" or "Lessee" under said Lease.

SECOND: E-A assumes said Lease as of October 8, 1974, and, subject to the provisions of this Agreement, will perform and observe all of the covenants and conditions therein contained on Tenant's part to be observed which shall accrue from and after said date; all with full force and effect as if E-A had executed the Lease.

EXHIBIT "5"



THIRD: Landlord agrees to credit toward E-A's obligations under the Lease all payments whenever made to Landlord by Franklin or the Receiver in respect of any period subsequent to October 7, 1974.

FOURTH: Landlord hereby waives and agrees not to assert against E-A or the Receiver any claims it may have against Franklin or the Federal Deposit Insurance Corporation, individually or as Receiver, nor will Landlord assert any claims against E-A arising out of E-A's occupancy of the Demised Premises as licensee of the Receiver.

FIFTH: Landlord and Tenant each agree that in any case where the provisions of this Lease require the consent or approval of either party, the same shall not be unreasonably withheld or delayed; and in any case where either party is required to do anything to the satisfaction of the other, such expression of satisfaction shall not be unreasonably withheld or delayed.

SIXTH: Landlord warrants and represents to Tenant that it has all requisite title, power and authority to enter into this Agreement and perform the terms of the Lease, that no approval of this Agreement by any mortgagee or other person is required and that this Lease has not been modified or amended except as hereinabove set forth.

SEVENTH: Landlord agrees that Tenant may, at its sole cost and expense, erect and maintain customary banking signs referring to its operations on the Demised Premises of a branch bank as well as computerized or electronic through-the-wall banking facilities operated in connection with credit cards or otherwise, provided that all plans, specifications and other details with respect to such signs and through-the-wall banking facilities are first approved in writing by Landlord. Landlord agrees that it will neither unreasonably withhold nor delay such approval. Notwithstanding the foregoing, Tenant may, without consent of Landlord, erect signs equivalent in size and scope to those maintained by Franklin National Bank prior to October 8, 1974.

EIGHTH: Landlord and Tenant will each upon the written request of the other at any time join in the execution and recording of a memorandum of lease in proper form for recordation in the proper office or offices wherein the Demised Premises are situated, setting forth the existence and terms of the Lease and this Lease Modification Agreement.

NINTH: Landlord and Tenant agree that whenever in the Lease it is provided that rent shall abate, it is understood that any item of additional rent shall similarly abate on the same basis.

TENTH: Landlord covenants and agrees that any underlying lease or mortgage hereafter placed upon the Demised Premises to which this Lease shall be subordinate, shall provide that if by dispossession, foreclosure or otherwise, such holder or any successor in interest shall come into possession of the Demised Premises, or shall become the owner of the Demised Premises, or take over the rights of Landlord in the Demised Premises, it will not disturb the possession, use or enjoyment of the Demised Premises by Tenant, its successors or permitted assigns, nor disaffirm this Lease or Tenant's rights or estate hereunder, so long as all of the obligations

of Tenant are fully performed in accordance with the terms of this Lease. Landlord will also use its best efforts to obtain from the holders of any underlying lease or mortgage to which this Lease is subordinate as of the date hereof a "non-disturbance" agreement similar to the above. It is expressly understood, however, that Landlord's obligation pursuant to the preceding sentence is not a condition of this Lease and that the inability to obtain same shall in nowise affect the validity of this Lease or Tenant's obligations thereunder in any respect whatsoever.

ELEVENTH: In consideration of the assumption by E-A of all obligations under the Lease accruing on and after October 8, 1974, Landlord expressly waives any defaults by Tenant under this Lease existing prior to the date hereof and any conditions which with the passage of time or the giving of notice, or both, would ripen into an event of default under said Lease.

TWELFTH: Subject to the conditions contained in this ARTICLE TWELFTH, the parties agree that in the event that the Landlord reasonably decides to improve the character of the property on which the Demised Premises are located either by the construction thereon of an office building or otherwise, Landlord shall have the right to cancel the Lease at the end of the original term or any extended term thereof, provided that: (a) Landlord gives Tenant one year's prior written notice of such intention to improve, along with the plans and specifications for such improvement, and (b) Landlord pays to Tenant as compensation for the early termination of Tenant's leasehold estate, an amount equal to the rent and additional rent reserved under the Lease for the year immediately preceding such cancellation. Notwithstanding the foregoing, in the event that Landlord constructs an office building on the site, Landlord agrees to offer to Tenant, upon completion thereof, a right of first refusal to lease ground floor space on terms no less favorable than those upon which such space is being leased to other lessees of comparable space.

THIRTEENTH: This Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

FOURTEENTH: Notice to Tenant shall hereafter be addressed to its Comptroller, at the address first above written.

FIFTEENTH: All other terms and conditions of the Lease are hereby ratified and confirmed.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed as of the date first above written.

WITNESS:

GENSEL PROPERTIES, INC.

By

Joseph L. Gensel  
President

WITNESS:

EUROPEAN-AMERICAN BANK & TRUST  
COMPANY

By

STATE OF NEW YORK )  
COUNTY OF Nassau ) ss.:

On the 31 day of January, 1975, before me personally came Ralph C. Gensel, to me known, who, being by me duly sworn, did depose and say that he resides at 330 Manhasset Woods Road, Manhasset, that he is the President of Gensel Properties, Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

James J. Milligan

JAMES J. MILLIGAN  
Notary Public, State of New York  
No. 30-27122-2, Nassau County  
Commission Expires March 30, 1975

STATE OF NEW YORK )  
COUNTY OF ) ss.:

On the       day of       , 1975, before me personally came       , to me known, who, being by me duly sworn did depose and say that he resides at       , that he is the President of European-American Bank & Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

Reply Affidavit of Lawrence Lever in Support of  
Motion for Summary Judgment

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 78

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FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank,

Plaintiff,

75 C. 276  
(O.G.J.)

-against-

AFFIDAVIT

JEAN M. GRELLA, LAWRENCE LEVER, and  
LEVER HOLDING CORP.,

Defendants.

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STATE OF NEW YORK )  
                          SS:  
COUNTY OF NEW YORK)

LAWRENCE LEVER, being duly sworn, deposes and says:

1. I am the defendant in this action, and I make this affidavit in reply to the Memorandum and other papers of defendant, JEAN M. GRELLA, ("GRELLA"), in opposition to plaintiff's motion for summary judgment herein.

2. I am present assignee of the lease between GRELLA and FRANKLIN NATIONAL BANK, (the "Ground Lease") that is the subject matter of this action. I am also the lessor on the lease whereby FRANKLIN NATIONAL BANK leased space for a branch office in the building that I constructed on GRELLA'S land (the "branch office lease").

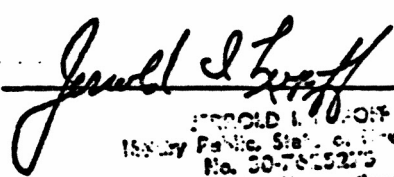
3. The branch office lease expressly prohibits assignment without my consent. Prior to the time that I received GRELLA'S notice of termination of the Ground Lease, I had indicated to representatives of plaintiff, FEDERAL DEPOSIT INSURANCE CORPORATION and of EUROPEAN-AMERICAN BANK TRUST COMPANY, that I would be willing to consent to an assignment of the branch office lease from FDIC to EAB.

4. I have not consented to such an assignment, nor have I reaffirmed my previous statement, that I would do so. I am reserving decision on the question whether I will give my consent.

  
\_\_\_\_\_  
LAWRENCE LEVER

Sworn to before me this

2<sup>nd</sup> day of March, 1976

  
\_\_\_\_\_  
HAROLD L. HOFF  
Notary Public, State of New York  
No. 80-7805275  
Qualified in Nassau County  
Term Expires March 30, 1976

Decision of Judd, J., dated June 16, 1976 Granting  
Plaintiff's Motion for Summary Judgment



1 THE COURT: I am following a somewhat unusual  
2 procedure this afternoon because getting along with the  
3 one secretary that the court is allowed, I can't get  
4 opinions out as rapidly as I would like.

5 This has been sitting a long time and I thought  
6 that those of you who are interested can get a copy from  
7 the court reporter. I will simply dictate to him what  
8 would take several more days to type, edit, revise and  
9 retype.

10 Plaintiff has moved for summary judgment in an  
11 action involving the interpretation of a default clause  
12 in a ground lease which defendant Grella and the Franklin  
13 National Bank entered into more than fifteen years ago.  
14 Defendant Grella not only opposes the motion but contends  
15 that summary judgment should be granted in her favor.

16 THE FACTS:

17 On Friday, October 8, 1974, the Comptroller of  
18 the Currency certified the insolvency of the Franklin  
19 National Bank and appointed the Federal Deposit Insurance  
20 Corporation as Receiver. The same day this court  
21 approved the sale of a substantial portion of the  
22 Franklin National Bank assets to the European American  
23 Bank and Trust Company which agreed to assume specified  
24 liabilities of the Franklin National Bank. In re  
25 Franklin National Bank, 381 F. Supp. 1390 (E.D.N.Y. 1974).

1 Thus there was a continuing operation of banking functions  
2 at Franklin National Bank branches, which opened the  
3 following day as branches of European American Bank.

4 One of these branches is located in the Lever  
5 building in Mineola, which was built on land leased by  
6 defendant Grella to Franklin National Bank. By a letter  
7 dated February 3, 1975, defendant Grella served a five-  
8 day notice of default on Franklin and others in the chain  
9 of title including Mineola Office Building Inc., Woodmere  
10 Knolls, Inc., Reliable Federal Savings and Loan Association,  
11 and the Lever Company, claiming that the declared  
12 insolvency of Franklin National Bank and the appointment  
13 of FDIC as Receiver constituted a default under Paragraph  
14 10 of the ground lease, and demanding that the demised  
15 premises be delivered up on February 11, 1975. She had  
16 already received and deposited the rent for the year  
17 ending February 28, 1976, but she tendered a check in  
18 reimbursement for that rent along with the letter  
19 enclosing the notice of default on the ground lease.

20 Paragraph 10 provides:

21 "If the tenant shall fail after sixty (60) days  
22 notice thereof from the landlord to comply with any  
23 statute, ordinances, rules, orders, regulations or  
24 requirements of the Federal, State or local government,  
25 or any of their Departments or Bureaus applicable to the

1 said premises, or if the said Tenant shall file or there  
2 shall be filed against the Tenant a petition in bankruptcy  
3 or arrangement, or Tenant be adjudicated a bankrupt or  
4 make an assignment for the benefit of creditors or take  
5 advantage of any insolvency act, the Landlord may, if the  
6 Landlord so elects, at any time thereafter terminate  
7 this lease and the term hereof, on giving to the Tenant  
8 five days notice in writing of the Landlord's intention  
9 so to do, and this lease and the term hereof shall  
10 expire and come to an end on the date fixed in such  
11 notice as if the said date were the date originally  
12 fixed in this lease for the expiration hereof."

13 This Court is asked to decide whether the appoint-  
14 ment of a receiver for Franklin was a proper basis for  
15 termination of the ground lease under Paragraph 10.  
16 FDIC seeks an injunction against any termination. The  
17 Court issued a preliminary injunction on March 13, 1975  
18 against any acts interfering with the possession of  
19 Franklin and its assigns.

20 The testimony of Mr. Lever, Mrs. Grella and of the  
21 mortgage officer of Reliance was taken at that time and  
22 is part of the record on the pending motions.

23 The facts set forth in FDIC's statement under  
24 Rule 9(g) of this Court's general rules have not been  
25 challenged by Grella and are accepted by the Court.

1 When the motion for summary judgment was argued Grella's  
2 attorney expressly rejected the Court's invitation to  
3 present further evidence.

4 The FDIC bases its motion for summary judgment  
5 only on the interpretation of the bankruptcy clause in  
6 the lease. Its complaint presents two other issues,  
7 that Grella waived any right of forfeiture by accepting  
8 rents after she knew about Franklin's receivership, and  
9 that Laver is now the Tenant under the lease, because  
10 among other things, the lease provides that its covenants  
11 "bind . . . assigns." If the motion for summary judgment  
12 is granted these matters need not be considered.

13 BACKGROUND OF THE GROUND LEASE:

14 In order to understand the total picture, it is  
15 necessary to trace the various agreements with respect  
16 to the ground lease, and the rental of branch office  
17 space.

18 Grella leased the land to Franklin National Bank  
19 in 1961. At that time there were a few structures on  
20 the land including a building previously used by Mrs.  
21 Grella and her husband as a diner. The lease was for a  
22 term of twenty (20) years commencing on March 1, 1961,  
23 with four 20-year options to renew. Annual rental was  
24 priced at \$21,000.00 per year, with the exception of the  
25 first year rental of \$11,350.00. Franklin had the right

1 to assign the lease without prior approval by Grella.  
2 A binder agreement signed on February 12, 1961 provided  
3 that the bank " . . . shall, of course, continue to  
4 remain liable for the rent and all of the other obliga-  
5 tions on the part of the Tenant . . . "

6 Grella was represented by attorneys in connection  
7 with the making of the lease. The binder had said  
8 nothing about the form of any bankruptcy clause. The  
9 construction and financing of an office building on the  
10 leased premises involved a series of assignments of the  
11 ground lease.

12 On November 1, 1962 Franklin entered into an  
13 agreement with defendant Lawrence Laver whereby Laver  
14 was to sublet the premises which were the subject of the  
15 ground lease under terms to be included in a "Primary  
16 Sub-Lease," and to purchase certain vacant lots owned by  
17 Franklin. At the same time Laver agreed to enter into a  
18 "Secondary Sub-Lease," with Franklin, whereby Franklin  
19 would be a Tenant in a portion of the building which was  
20 to be erected by Laver on the leased premises.

21 Laver on December 9, 1963 assigned all of his  
22 interest in that contract to Mineola Office Buildings  
23 which assumed all of his obligations under the contract.  
24 A Memorandum of Lease signed the same day by Franklin  
25 and Mineola Office Buildings set forth the terms of the

1 "Primary Sub-Lease." They also signed an agreement of  
2 lease whereby Franklin leased an area of 4105 square  
3 feet in a building to be erected by Mineola Office  
4 Buildings at an annual rental of \$25,170.00 commencing  
5 ten (10) days after notice of certification for  
6 occupancy and terminating on February 27th, 1981.

7 On December 28, 1964, Mineola Office Buildings as  
8 lessee under the "Primary Sub-Lease," surrendered the  
9 lease to Franklin and entered into a new agreement with  
10 Franklin providing for the assignment by Franklin of its  
11 interest in the lease entered into between defendant  
12 Grella and Franklin in 1961. ("The Secondary Sub-Lease"  
13 for office space was unaffected by the surrender of the  
14 "Primary Sub-Lease.") Shortly after the execution of  
15 that assignment, on January 7, 1965, Mineola Office  
16 Buildings assigned its interest in the Grella lease to  
17 Woodmere, which took subject to the lease. Woodmere was  
18 a corporation owned by Lever and exercised two of the  
19 renewal options thus extending the term of the "Primary  
20 Sub-Lease" to February 23, 2021.

21 Woodmere then assigned the "Primary Sub-Lease" to  
22 Queens County Federal Savings & Loan Association on  
23 January 7, 1965 as security for a mortgage. The lease  
24 was thereafter reassigned to Lever on August 27, 1965.  
25 On September 23, 1970, Reliance became a mortgagee of the



1 ground lease under a mortgage which consolidated its  
2 mortgage and the Queens County Federal Savings & Loan  
3 mortgage. (Lever had reassigned the ground lease to  
4 Woodmere for the purpose of making the mortgage with  
5 Reliance. After the execution of the mortgage Woodmere  
6 reassigned the ground lease back to Lever.) Reliance  
7 also had a collateral assignment of the ground lease and  
8 a mortgage on all the realty Lever had purchased outright  
9 from Grella or Franklin for parking facilities required  
10 by local regulations to be provided in conjunction with  
11 the construction of the Lever building.

12 As the result of these numerous transactions, as  
13 of September 23, 1970, Lever was the assignee of the  
14 ground lease subject to a first mortgage held by Reliance  
15 and subject to a collateral assignment of the ground  
16 lease to secure \$2,000,000 of indebtedness.

17 During the pendency of this action the Lever  
18 Holding Corp. has taken over the position of Reliance  
19 because Reliance would not renew the mortgage while the  
20 termination notice still had validity, and I suppose  
21 thereby the maneuvers to prevent direct liability on the  
22 mortgage were of no further use.

23 The Lever Company or Lever Management Corporation  
24 has paid the ground lease rent in January or February of  
25 each year commencing in 1965, with the last check,



1 before the case came to me, dated January 10, 1975. I  
2 am not sure about a 1975 check but I think one was  
3 tendered. Checks in the amount of \$21,000.00 (with the  
4 exception of the first which was in the amount of  
5 \$25,000.00) were payable to Queens Savings & Loan for the  
6 years 1968-1968, and to Raliance from 1969-1975. Gralla  
7 accepted the last check which covered the period from  
8 March 1, 1975 to February 28, 1976, and then attempted  
9 to tender return of the rent which was refused by Lever.  
10 Gralla has refused subsequent tender of the 1976-1977  
11 rent. There is no claim of default for non-payment of  
12 rent.

13 OTHER PERTINENT FACTS:

14 Prior to the institution of this suit by the FDIC,  
15 Lever brought an action in the Supreme Court of Nassau  
16 County against Gralla and Raliance for an interpretation  
17 of the rights of each of the parties in the ground lease.  
18 The preliminary injunction by this court did not stay  
19 the State Court action. A motion by Gralla for summary  
20 judgment in that action has been denied. If Gralla is  
21 successful in her proceeding, under the terms of the  
22 ground lease, the demised premises and the building  
23 would revert to her, and the investment in the building  
24 would be lost.

25 Although FDIC has parts with ownership of the

1 ground lease, it is concerned to prevent termination of  
2 the lease because of public policy considerations. It  
3 urges that it must be able to assure continuation of the  
4 opportunity to provide banking facilities at specific  
5 locations in order to induce a healthy bank to buy the  
6 assets of an insolvent bank which is one of the methods  
7 by which it preserves the assets of insolvent banks.

8 Gralla counters this argument with an offer to  
9 enter into a non-disturbance agreement with European  
10 American. FDIC has rejected the offer, claiming that  
11 Paragraph 11 of the office lease requires Lever's  
12 approval of any assignment, and thus Gralla alone cannot  
13 guarantee European American's continued occupancy. Lever,  
14 in an affidavit to the Court, states that he is now  
15 reserving decision on whether he would consent to an  
16 assignment of the branch office lease from FDIC to  
17 European American. European American now occupies the  
18 branch office space as a licensee of Franklin.

19 According to Gralla, a fair rental under the  
20 ground lease would now be three times the present rental.

21 DISCUSSION:

22 Summary judgment may be granted if there is no  
23 genuine issue of material fact, Rule 56(c) Federal Rules  
24 of Civil Procedure, *Mayman v. Commerce & Industry*  
25 *Insurance Co.*, 524 F. 2d 1317(2d Cir. 1975). With the

1 issue for summary judgment limited to whether there has  
2 been a default under the terms of Paragraph 10 by either  
3 Franklin or Laver, the Court is in a position to decide  
4 that issue as a matter of law.

5 The construction of a lease, like any other  
6 contract, is essentially a question of law, which can  
7 properly be disposed of on a motion for summary judgment.  
8 *Cornellier v. American Casualty Company*, 389 F. 2d,  
9 641(2d Cir. 1963).

10 As to jurisdiction, before interpreting the lease,  
11 the Court must deal with Grella's attack on its jurisdiction,  
12 which is really an attack on FDIC's standing, because it  
13 assigned its rights in the lease. The assumption of  
14 jurisdiction for the purposes of the preliminary  
15 injunction is not decisive in itself, but the Court is  
16 satisfied on further review that the FDIC has sufficient  
17 interest to bring the action.

18 If the FDIC is still the Tenant under the ground  
19 lease, then it is liable, either as receiver or in its  
20 corporate capacity, as successor<sup>or</sup> to Franklin for future  
21 payments under Article 15 of the ground lease in spite  
22 of Grella's termination of the lease. That fact gives  
23 FDIC an interest in the question, even if Grella has not  
24 yet filed a claim with the receiver.

25 No case cited by plaintiff denies jurisdiction

1 under the circumstances existing here. A 90

2 Typical of the cases cited by Grella in support  
3 of its jurisdictional challenge is Parkview-Gem Inc. v.  
4 Stein, 516 Fed. 2d 807 (8th Cir. 1975). In Parkview, a  
5 bankruptcy court was held to lack jurisdiction to enjoin  
6 the lessor from terminating a lease which was not part  
7 of the debtor's estate. The lease had been assigned  
8 previously to a solvent subsidiary of the debtor.

9 The Parkview case dealt with the limitations on  
10 " . . . piercing the corporate veil . . . " and the  
11 limitation on the jurisdiction of bankruptcy courts  
12 under 11 . . . between U.S.C. Section 541. The Court of  
13 Appeals in Parkview said:

14 " . . . The issue of whether the lease is subject  
15 to forfeiture is not before us. Such issue requires  
16 resolution by a court having jurisdiction . . . "

17 Since this Court is not subject to the limitations  
18 of a bankruptcy court, the issues of lease forfeiture  
19 may properly be decided.

20 Grella's argument based on Callaway v. Benton,  
21 336 U.S. 132, 142-144 (1949) is also not in point. That  
22 case also dealt with the limited powers of a bankruptcy  
23 court, in a railroad reorganization under Section 77 of  
24 the Bankruptcy Act. The only other case cited by Grella  
25 which needs consideration on this point is Caplin v.

1 Marine Midland Grace Trust Co. 406 U.S. 416, (1972)  
2 which she quotes at length. That case simply held that  
3 a trustee under Chapter X of the Bankruptcy Act was not  
4 a representative of debenture holders as a separate  
5 class of creditors, and therefore that the trustee could  
6 not bring an action on their behalf against the indenture  
7 trustee.

8 The Grella memorandum also overlooks the special  
9 character of FDIC as a Federal agency. FDIC has a  
10 legitimate public interest in establishing the efficacy  
11 of transactions which it affects pursuant to its  
12 statutory duty as receiver of a national bank. As the  
13 Court stated in United States v. Arlington County, 326 F.  
14 2d 929, 932 (4th Cir. 1964):

15 " . . . The right of the Federal Government to  
16 bring suit to enforce its policies and programs even in  
17 the absence of immediate pecuniary interest has been  
18 upheld in numerous fields of Federal activity . . . "  
19 I believe the same rule applies to an agency like the  
20 FDIC.

21 Nor is there merit to the objection that FDIC has  
22 not shown a jurisdictional amount. In the first place,  
23 the potential claim against FDIC, if the lease is  
24 terminated, would exceed \$10,000. In any event, the  
25 FDIC has an independent right to sue in the Federal

1 courts on all actions, without regard to jurisdictional  
2 amount, 12 U.S.C. Section 1819, Fourth.

3 The Court of Appeals recently upheld the right  
4 of FDIC, as receiver of an insolvent bank, to remove an  
5 action to Federal Court in order to pursue claims  
6 involving a national bank. Joseph J. Kanner, et al.  
7 v. Raymond T. Anderson et al. (2d Cir. March 22, 1976).

8 That brings me to the bankruptcy clause of the  
9 lease. None of the events described in the bankruptcy  
10 clause of the lease has taken place, even if Franklin  
11 National Bank was the Tenant after the series of assign-  
12 ments. The pertinent language of Section 10 is:

13 " . . . or if the said Tenant shall file or  
14 there shall be filed against the tenant a petition in  
15 bankruptcy or arrangement,

16 "or Tenant is adjudicated a bankrupt,

17 "or make an assignment for the benefit of  
18 creditors,

19 "or take advantage of any insolvency act . . . "

20 The Bank did not file a petition in bankruptcy or  
21 arrangement. No petition in bankruptcy or arrangement  
22 was filed against the Bank. The Bank was not adjudicated  
23 as bankrupt. The Bank did not make an assignment for  
24 the benefit of creditors.

25 The Bank did not " . . . take advantage of any



1 insolventcy act . . . " The Declaration of Insolventcy  
2 was made independently and ex parte by the Comptroller  
3 of the Currency pursuant to 12 U.S.C. Section 191 and  
4 12 U.S.C. Section 1821(c). There is at the most a very  
5 limited review possible of the Comptroller's finding of  
6 insolventcy, *Minichello v. Saxon*, 337 F. 2d 75 (3d Cir.  
7 1964), if indeed the action is not unreviewable, in re  
8 Conservatorship of Wellsville National Bank, 407 F. 2d  
9 233 (3d Cir. 1969).

10 The approval by the Court of the sale of certain  
11 assets was required by 12 U.S.C. Section 192, but even  
12 this is not a judicial action but an administrative one.  
13 In re Home National Bank, 147 F. Supp. 389, 390 (S.D.N.Y.  
14 1956); *Hulsa v. Argetsinger*, 18 F. 2d 944, 945 (2d Cir.  
15 1927).

16 I come now to the forfeiture clauses. The  
17 portions of the clause referring to bankruptcy have no  
18 application to a national bank, Title 11 U.S.C. Section  
19 22, specifically excludes a banking corporation from  
20 among those who may become bankrupts voluntarily, or be  
21 adjudged an involuntary bankrupt. National banks fall  
22 within the exclusion. *Kennedy v. Boston Continantal*  
23 *National Bank* 11 F. Supp. 611, 617 (D. Mass. 1935).

24 Although forfeiture clauses are generally  
25 regarded unfavorably, unambiguous clauses are enforce-



1 able in the Federal and State Courts. First National  
2 Storage Inc. v. Yellowstone Shopping Center Inc., 21 N.Y.  
3 2d, 630 (1968).

4 The limitations on forfeitures were formulated in  
5 re Murray Realty Co., 35 F. Supp. 417, 419-20 (N.D.N.Y.  
6 1940) in the following terms:

7 " . . . Forfeitures should never be decreed unless  
8 the language of the instrument sought to be construed  
9 so states in clear, unmistakable terms . . . "

10 This is true under New York law as well as  
11 Federal law. Gillette Bros. Inc. v. Aristocrat  
12 Restaurant Inc., 239 N.Y. 87, 92 (1924) and First  
13 National Stores Inc. v. Yellowstone, which I cited; in  
14 re Imperial "400" National, Inc., 429 F. 2d 680, 683  
15 (3d Cir. 1970).

16 The Imperial "400" case is not contrary to Finn  
17 v. Meighan, 325 U.S. 300, 65 S.Ct. 1147 (1945), as  
18 Grella asserts. The Finn case recognized that there was  
19 a difference between "adjudged bankrupt" and "adjudged  
20 insolvent," but it permitted forfeiture because a  
21 Chapter X proceeding fell within the definition of  
22 insolvency. The Imperial "400" case illustrates the  
23 importance of precise language in a forfeiture clause,  
24 for it involved a clause relating only to bankruptcy  
25 and held that reorganization was different from

1 bankruptcy.

2 For the same reason, Grella's case is not helped  
3 by Ruppert Realty Corp. v. Bank of United States, 156  
4 Misc. 93 (Supreme Court N.Y. 1935) and affirmed on other  
5 grounds in the Appellate Division and the Court of Appeals.  
6 That case held that the decision of the Superintendent  
7 of Banks to take possession of a state bank was the  
8 equivalent of a receivership; but the bankruptcy clause  
9 in this case does not provide for termination of the  
10 lease upon the appointment of a receiver.

11 None of the New York cases cited by Mrs. Grella's  
12 counsel permits termination of a lease unless one of the  
13 events specifically described in the forfeiture clause  
14 has taken place, which is not true here.

15 Grella's counsel asserts that it was unnecessary  
16 for the lease to refer to a declaration of insolvency by  
17 the Comptroller of the Currency because " . . . the  
18 default clause is the standard printed Gilsey form  
19 clause which has been used in New York for a hundred  
20 years . . . " Actually the default clause is not the  
21 standard printed Gilsey form clause, first because it is  
22 part of a typewritten form dealing specifically with the  
23 premises here involved. And moreover the form cannot  
24 have been in use in New York for a hundred years, for it  
25 refers to a " . . . petition in bankruptcy or arrange-

1 ment . . . " and the modern bankruptcy law was not  
2 enacted until 1898, and Chapter XI of the Bankruptcy Act,  
3 dealing with arrangements, was added to the Act in 1933  
4 by 11 U.S.C. Section 701. The reference before that  
5 would have been to a "composition." Attorneys who  
6 intended a forfeiture clause to be triggered by the  
7 receivership of a national bank could have devised  
8 language to that effect. Mrs. Gralla was represented  
9 before the execution of the lease by the same attorneys  
10 who now represent her, and they could have asked for a  
11 change. The binder which had been previously signed  
12 stated:

13 "No. 7. The lease shall, in addition to the  
14 above, contain such other terms and provisions  
15 as are customary in a net lease transaction and  
16 mutually satisfactory to the parties hereto.  
17 (Emphasis added)."

18 In the absence of a provision specifically  
19 permitting termination of the lease if a receiver is  
20 appointed, the court should not expand the forfeiture  
21 clause to cover such a situation.

22 The rule of strict interpretation of forfeiture  
23 clauses is confirmed in 2 Powell, The Law of Real  
24 Property (1975 Revision) 290:

25 "While forfeiture clauses are generally  
disfavored and strictly construed in favor  
of the tenant, they will be enforced by  
the courts if sufficiently explicit."

1 Even explicit language may be narrowed by the  
2 New York courts. Chief Judge Breitel in W.F.M. Restaurant,  
3 Inc. v. Austern, 35 N.Y.2d 610, 616 (1974) stated:

4 "Before a forfeiture may result the bankruptcy  
5 petition must have had some apparent substance  
6 and validity."

7 In other words, even though the bankruptcy clause  
8 provided for a termination notice, if a petition in  
9 bankruptcy be filed against a tenant, he indicated that  
10 the court could look behind the mere filing to determine  
11 whether there was substantial foundation for a forfeiture.

12 None had been shown in this case.

13 I will mention also the "Equities."

14 Termination of the lease in this case will be  
15 disastrous to the parties in the chain of title. Mrs.  
16 Grella will not only be able to negotiate a more  
17 favorable lease with European American if she chooses,  
18 but she would take over a building which she did not  
19 erect, and which has a present value in excess of  
20 \$2,000,000.00.

21 Continuation of the lease imposes no risk on  
22 Grella. Her rent has been prepaid, and there is every  
23 indication that it will be paid without any risk of  
24 default into the indefinite future. Her quarrel is not  
25 with FDIC or with Laver, but with inflation. She is in

1 much the same situation as the plaintiff in Brobrad Co. v.  
2 United States Postal Service, 404 F. Supp. 691 (E.D.N.Y.  
3 1975), who sought relief from a long term lease because  
4 inflation had diminished the value of the rental payments  
5 during the intervening years. I denied relief there, too.

6 Under some circumstances a federal court may  
7 refuse to enforce a forfeiture clause even in a situation  
8 precisely within its terms, as in Queans Boulevard Wine  
9 & Liquor Corp. v. Blum, 503 F.2d 202 (2d Cir. 1974) and  
10 In re Fleetwood Motel Corp., 335 F.2d 857 (3d Cir. 1964).  
11 The extent of that rule need not be explored here, since  
12 none of the events described in the forfeiture clause  
13 has taken place.

14 Consequently it is ORDERED that the plaintiff's  
15 motion for summary judgment be granted without costs.  
16 Plaintiff should submit a proposed judgment on three  
17 days' notice.

18 That is the end of the opinion. Now, I would  
19 just like to add that one reason I asked counsel to be  
20 here this afternoon was not only to avoid the delay  
21 which would be involved in transcribing and revising my  
22 opinion, but to suggest that some adjustment of the  
23 lease should be considered. It may be too late for Mrs.  
24 Gralla to claim that the original lease was unconscion-  
25 able, but a lease covering a property for 100 years

1 without any readjustment of rent is most unusual. There  
2 are uncertainties still ahead in this case, depending  
3 on the success of an appeal from my order granting  
4 summary judgment to the plaintiff, and on the results of  
5 a trial if the order is reversed. If Mr. Lever now owns  
6 the property individually without any obligation to  
7 public stockholders he need not be afraid to vary the  
8 terms of a binding contract, and I hope that his counsel  
9 may sit down with Mrs. Grella's counsel and work out  
10 some early adjustment of the fixed rent. It might be  
11 fair to provide some periodic reevaluations to give her  
12 a little more benefit from the land she contributed to  
13 his enterprise than the Franklin National Bank was  
14 willing to do in 1964.

15 Off the record.

16  
17 \* \* \*  
18  
19  
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23  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 100

-----X  
FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

75 C 276  
(O.G.J.)

Plaintiff,

-against-

JEAN M. GRELLA, LAWRENCE LEVER, and  
LEVER HOLDING CORP.,

Defendants.  
-----X

JUL 6 1976  
TIME 1:51  
JUDGMENT

Plaintiff Federal Deposit Insurance Corporation ("FDIC") as receiver of Franklin National Bank ("FNB") having moved for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment against defendant Jean M. Grella on its claim for a permanent injunction against termination by defendant Grella of a lease dated April 4, 1961 entered into by defendant Grella and FNB ("the Ground Lease"), and a hearing having been held on said motion before the Honorable Orrin G. Judd, United States District Judge, and the Court having ordered that summary judgment be granted in favor of plaintiff on the grounds that none of the events described in the forfeiture clause of the Ground Lease has occurred, and the Court recognizing that there exist cross claims herein against defendant Grella and having determined that there is no just reason for delay of entry of judgment on the complaint and having expressly directed that final judgment be entered thereon, it is hereby

ORDERED, ADJUDGED AND DECREED that final judgment be entered in favor of plaintiff without costs; and it is



FURTHER ORDERED, ADJUDGED AND DECREED that defendant Grella's notice dated February 3, 1975 purporting to terminate the Ground Lease is void and of no effect whatever; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the Ground Lease is in full force and effect; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendant Grella, her agents, servants, employees, privies, successors, assigns, attorneys, all persons under their control, direction, permission or license, and all persons in active concert and participation with them or any of them, be and they are hereby permanently enjoined from

(a) terminating the Ground Lease on the basis that on October 8, 1974 the Comptroller of the Currency of the United States declared that FNB was insolvent and appointed FDIC as receiver of FNB;

(b) re-entering the premises covered by the Ground Lease or any of the improvements constructed thereon and recovering possession thereof by any means whatsoever, including without limitation, summary proceedings, so long as the Ground Lease remains in full force and effect;

(c) taking any action inconsistent with the rights of FNB and its assignees under the Ground Lease or a lease agreement whereby space in the building constructed on the parcel covered by the Ground Lease was leased to FNB;

A 102

(d) interfering in any way with European-American Bank & Trust Company's occupation and use of the branch office space as a licensee of FDIC as receiver of FNB.

Dated: Brooklyn, New York  
July 2, 1976

  
U.S.D.J.

Order To Show Cause And Temporary Restraining Order,  
dated February 24, 1975

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

75C 276 A 103

----- x  
FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank,

Plaintiff,

75 C.

-against-

JEAN M. GRELLA, LAWRENCE LEVER, and  
RELiance FEDERAL SAVINGS AND LOAN  
ASSOCIATION OF NEW YORK,

Defendants.  
----- x

ORDER TO SHOW  
CAUSE AND  
TEMPORARY  
RESTRAINING  
ORDER

Upon reading the complaint herein, the affidavit of  
Kalman A. Oravetz, and the exhibits submitted therewith, it is  
hereby

ORDERED, that the defendants herein show cause before  
a Judge of this Court, in <sup>Court</sup> Room 11, United States Courthouse,  
225 Cadman Plaza East, Brooklyn, New York, on the 27<sup>th</sup> day  
of February, 1975 at 2 o'clock P.M., or as soon thereafter  
as counsel can be heard, why a preliminary injunction pursuant  
to Rule 65 of the Rules of Civil Procedure for the United States  
District Courts should not issue herein enjoining the defendant  
Jean M. Grella ("Grella"), her agents, servants, employees,  
privies, successors, assigns, attorneys, all persons under their  
control, direction, permission or license, and all persons in  
active concert and participation with them, pending the final  
hearing and determination of this action, from

(a) terminating the Lease entered into on April 4, 1961  
(the "Ground Lease") between Grella and Franklin National  
Bank ("FNB"), formerly known as Franklin National Bank of  
Long Island, on the basis that on October 8, 1974 the

Comptroller of the Currency of the United States declared that FNB was insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver of FNB pursuant to 12 U.S.C. §§ 191 and 1821(c);

(b) re-entering the premises covered by the Ground Lease or any of the improvements constructed thereon and recovering possession thereof by any means whatsoever, including without limitation, summary proceedings, so long as the Ground Lease remains in full force and effect;

(c) taking any action inconsistent with the rights of FNB and its assignees under the Ground Lease or a lease agreement whereby space in the building constructed on the parcel covered by the Ground Lease was leased to FNB;

(d) interfering in any way with Plaintiff's assignment of FNB's lease of the branch office space to European-American Bank & Trust Company ("EAB") as agreed to by EAB and Lawrence Lever; and

(e) providing such other, further and different relief as to the Court may seem just and proper; and

It appears to the Court that in the absence of a temporary restraining order plaintiff will be irreparably injured by defendant Grella's termination of the Ground Lease, reentering the premises, or any of the improvements constructed thereon and recovering possession of them by any means whatsoever, by her taking any action inconsistent with the rights of FNB and its assignees under the Ground Lease or a lease agreement whereby space in the building constructed on the parcel covered by the

Ground Lease was leased to FNB, and by her interfering in any way with plaintiff's assignment of FNB's lease of the branch office space to EAB as agreed to by EAB and Lawrence Lever. A money judgment based upon such conduct by defendant Grella will constitute a wholly inadequate remedy.

Plaintiff has given notice to defendants of its application for a temporary restraining order, and

→ Plaintiff, being exempt from the requirement of posting security by virtue of 28 U.S.C. § 2408, it is

ORDERED that defendant Grella, her agents, servants, employees, privies, successors, assigns, attorneys, all persons under their control, direction, permission or license, and all persons in active concert and participation with them or

TR0  
/

any of them, be and they are hereby restrained from

(a) terminating the Ground Lease on the basis... that on October 8, 1974 the Comptroller of the Currency of the United States declared that FNB was insolvent and appointed the FDIC as Receiver of FNB;

(b) reentering the premises covered by the Ground Lease or any of the improvements constructed thereon and recovering possession thereof by any means whatsoever, including without limitation, summary proceedings, so long as the Ground Lease remains in full force and effect;

(c) taking any action inconsistent with the rights of FNB and its assignees under the Ground Lease or a lease agreement whereby space in the building constructed on the parcel covered by the Ground Lease was leased to FNB;



(d) interfering in any way with Plaintiff's  
assignment of FNB's lease of the branch office  
space to European-American Bank & Trust Company  
("EAB") as agreed to by EAB and Lawrence Lever,  
and providing such other, further and different  
relief as to the Court may seem just and proper;  
and it is further

ORDERED that this order shall expire within 10 days  
after entry unless within such time the order for good cause  
shown is extended for a longer period; and it is further

ORDERED that service of this order to show cause  
together with a copy of the papers submitted in support hereof  
on or before February 24, 1975, at 12<sup>15</sup> o'clock P.M., be  
deemed sufficient service.

Dated: Brooklyn, New York  
February 21, 1975  
at 6 o'clock P.M.

/s/ ORRIN G. JUDD  
United States District Judge



Affidavit of Kalman A. Oravetz In Support of Application  
For Temporary Restraining Order and Preliminary Injunction

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 107

----- x  
FEDERAL DEPOSIT INSURANCE CORPORATION, :  
as Receiver of Franklin National Bank, :

Plaintiff, :

-against- :

JEAN M. GRELLA, LAWRENCE LEVER, and :  
RELiance FEDERAL SAVINGS AND LOAN :  
ASSOCIATION OF NEW YORK, :

Defendants. :

75 C.

AFFIDAVIT IN  
SUPPORT OF  
APPLICATION  
FOR TEMPORARY  
RESTRAINING  
ORDER AND  
PRELIMINARY  
INJUNCTION

----- x  
STATE OF NEW YORK )  
: ss.  
COUNTY OF NEW YORK )

KALMAN A. ORAVETZ, being duly sworn, deposes and says:

1. I am a member of the firm of Hughes Hubbard & Reed, attorneys for the plaintiff herein, am a member of the bar of this Court, and am familiar with the facts and proceedings herein.

2. This action involves a lease on certain unimproved land entered into in 1961 between defendant Jean M. Grella ("Grella"), the owner of the fee, and Franklin National Bank ("FNB"), then known as Franklin National Bank of Long Island (the "Ground Lease"). Subsequent to 1961, a six-story office building was constructed on the land by mesne assignees of the Ground Lease. FNB is the lessee of branch banking space in the building. I make this affidavit in support of the application of plaintiff Federal Deposit Insurance Corporation ("FDIC") as Receiver of FNB, for a temporary restraining order and preliminary injunction enjoining Grella from terminating the Ground Lease pending the final hearing and determination of this action.

The Parties

A 108

3. FDIC is an agency of the United States Government organized and existing under and by virtue of an act of Congress (12 U.S.C. §§ 1811-1831). On information and belief, FDIC is the federal supervisory agency for more than 8700 financial institutions; it insures depositors in virtually all commercial banks and approximately two-thirds of the mutual savings banks in the United States, and each depositor is insured on the aggregate of all deposits held in the same right and capacity up to a present statutory maximum of \$40,000. FDIC is also authorized to act as receiver of any insured bank.

4. On October 8, 1974, pursuant to 12 U.S.C. §§ 191 and 1821(c), FDIC was appointed receiver of FNB by the Comptroller of the Currency of the United States. As Receiver FDIC has exclusive dominion and control of the assets of FNB.

5. On information and belief, defendant Grella is a resident of Nassau County residing at 20 Wendell Street, Hempstead, Long Island, New York; Grella is, and has been since April 4, 1961, the owner of the land covered by the Ground Lease.

6. On information and belief, defendant Lawrence Lever, ("Lever") is a resident of Nassau County, New York residing at Cedar Swamp Road, Glen Head, Long Island, New York; Lever was the sole stockholder of Mineola Office Building, Inc. ("MOB"), and Woodmere Knolls, Inc. ("Woodmere"), both of which are mesne assignees of the Ground Lease. On information and belief, defendant Reliance Federal Savings and Loan Association of New York ("Reliance") is a savings and loan association organized under the laws of the United States of America with principal offices at 89-61 162nd Street, Jamaica, New York; Reliance is successor in interest to Queens Savings and Loan Association ("Queens S&L"). Lever and

Reliance have been made nominal defendants herein because they have interests in the subject matter of the action.

The Leases

7. By the Ground Lease dated April 4, 1961, a copy of which is attached to the Complaint as Exhibit A, Grella leased to FNB a parcel of land in Mineola, Long Island, New York, located on the north side of Old Country Road between Willis Avenue and Roslyn Road (the "Ground"), for a period to expire on February 28, 1981, but giving the tenant the option to renew for up to four additional twenty-year periods.

8. On information and belief, on or about November 1, 1962, FNB and Lever entered into an agreement whereby FNB agreed to sublease the Ground to Lever, who was to construct an office building thereon, and Lever agreed to lease space in the proposed building to FNB for use as a branch office. A copy of the agreement is attached hereto as Exhibit 1.

9. On information and belief, in order to build the contemplated office building, Lever required a zoning variance; Grella joined with Lever in making an application for such a variance in 1963, and the application was granted.

10. On information and belief, on December 9, 1963, Lever assigned his contract with FNB to MOB; FNB then subleased the Ground to MOB, and MOB subleased to FNB branch office space in the building to be constructed on the Ground. A copy of these agreements is attached hereto as Exhibit 2. On information and belief, the office building ("Lever's Building") was completed in 1965, and FNB subsequently occupied the branch office space subleased to it.

11. On information and belief, on or about December 28, 1964, FNB and MOB entered into an agreement pursuant to

which MOB would surrender to FNB its sublease of the Ground, FNB would assign the Ground Lease to MOB and MOB's sublease of branch office space to FNB would continue. A copy of this agreement is attached hereto as Exhibit 3. The assignment of the Ground Lease by FNB to MOB was recorded in the office of the County Clerk for Nassau County.

12. On information and belief, on or about January 7, 1965, MOB assigned the Ground Lease to Woodmere, and Woodmere in turn assigned the Ground Lease to Queens S&L as collateral for certain loans. Each of the assignments was recorded in the office of the County Clerk for Nassau County.

13. On information and belief, by communications dated January 7, 1965, Woodmere:

(a) notified Grella of the assignment of the Ground Lease to MOB, and of the assignments of the Ground Lease from MOB to Woodmere and from Woodmere to Queens S&L;

(b) notified Grella that notices and communications should be sent to Queens S&L at 89-61 162nd Street, Jamaica, New York; and

(c) delivered to Grella a signed declaration that Woodmere was exercising its first two renewal options as Tenant under paragraph 17 of the Ground Lease, thereby extending the term of the Ground Lease to February 28, 2021.

14. On information and belief, on August 25, 1965 Woodmere assigned the Ground Lease to Lever, subject to its prior assignment of the Ground Lease to Queens S&L, and said assignment to Lever, a copy of which is attached hereto as Exhibit 4, was recorded in the office of the County Clerk for Nassau County.

15. On information and belief, at all times relevant herein FNB and/or its assignee and/or subsequent assignees of the Ground Lease have fully complied with the terms, covenants and conditions contained in the Ground Lease, and all payments of rent have been timely made in full.

FDIC's Acts as Receiver of FNB

16. On October 8, 1974 the Comptroller of the Currency of the United States declared FNB insolvent and, pursuant to 12 U.S.C. § 1821(c), appointed FDIC receiver of FNB. As Receiver, FDIC entered into a Purchase and Assumption Agreement whereby it sold certain of FNB's assets and transferred certain of FNB's liabilities to European-American Bank & Trust Company ("EAB"). This transaction was approved by this Court in an order signed by Judge Orrin Judd dated October 8, 1974.

17. Immediately after this Court approved the purchase and assumption transaction referred to in paragraph 16 above, EAB entered into the leased branch office in Lever's Building as licensee of the Receiver and since that time has been providing to FNB depositors and to the community the banking services formerly provided by FNB.

18. EAB has asked the Receiver to assign FNB's sublease on the branch office space in Lever's Building to EAB, and has advised the Receiver that in accordance with the Purchase and Assumption Agreement it will buy from the Receiver at appraised value certain improvements and personalty located in the branch office. Lever has indicated that he will consent to the requested assignment.

19. Since October 8, 1974, the Receiver has made payments to Lever with respect to the leased branch office occupied by EAB. On information and belief, Lever has continued to make



rent payments to Grella under the Ground Lease; in January 1975 Lever prepaid, and Grella accepted, the annual rent of \$21,000 due under the Ground Lease on March 1, 1975 for the year ending February 29, 1976.

Grella's Purported Termination of the Ground Lease

20. On information and belief, Grella mailed a notice dated February 3, 1975 to FNB, in care of FDIC as Receiver in Washington D.C., and to MOB, Woodmere, Reliance and Lever, purporting to terminate the Ground Lease as of February 11, 1975, claiming that the insolvency of FNB declared on October 8, 1974 constituted a default under Paragraph 10 of the Ground Lease. A copy of this notice is annexed as Exhibit B to the complaint.

21. Grella's notice of termination was wrongful because none of the events or conditions required by Paragraph 10 of the Ground Lease has occurred. Neither FNB nor the present tenant in possession has filed a petition in bankruptcy or arrangement, nor had a petition filed against it, nor been adjudicated a bankrupt, nor made an assignment for the benefit of creditors, nor taken advantage of any insolvency act. Paragraph 10 does not by its terms apply to the events which took place with respect to FNB.

Irreparable Injury and the Balance of Hardships

22. There are many interests that will be irreparably injured if Grella is allowed to effectuate her wrongful termination of the Ground Lease: the ability of FDIC to discharge its official functions will be impaired; the public interest will be disserved as a result of the impairment of FDIC's decreased effectiveness; FNB's receivership estate will suffer substantial injury; EAB will be impeded in its effort to establish itself as a viable Long Island Bank; and Lever will lose his building.. Most important from FDIC's



point of view are the impairment of its own effectiveness as an arm of the Government and the injury to the public.

23. FDIC is empowered by 12 U.S.C. § 1823(e) to enter into purchase and assumption transactions, such as that with EAB, in which a healthy bank purchases assets of a closed bank, assumes some of its liabilities, and reopens the branches of the closed bank, preferably without interruption of service. FDIC is authorized to effectuate such transactions if it judges that they will reduce the risk or avert a threatened loss to the FDIC deposit insurance fund. If FDIC is not able to effect such transactions, obviously it is deprived of an authorized means of avoiding or reducing vast inroads into its financial resources.

24. Further, the public has an interest, both short-term and long-term, in FDIC's having recourse to purchase and assumption transactions. If no bank were willing to enter into such a transaction, the most immediate impact on the public would be that the insolvent bank would be closed, insured depositors would be required to wait the necessary weeks until FDIC as insurer could gear up to pay them their insured amounts, uninsured depositors might never be paid in full, and millions of dollars of checks in the process of collection would be returned unpaid. In the long run, whole communities would suffer because if each time a bank closes no new bank is willing to take its place, there will be an increase of concentration in the banking industry. As a result of the Purchase and Assumption transaction with EAB, FNB was replaced on Long Island by a new, financially healthy bank, and without so much as an hour's interruption in service.

25. If, however, landlords such as Grella are permitted to terminate leases and evict purchasing banks from the

leased premises at will, without there having occurred an event of default as required by the lease, the willingness of sound banking institutions to enter into purchase and assumption transactions and continue business at the insolvent bank's premises must obviously decrease.

26. Grella, on the other hand, will suffer no discernable injury from the staying of her exercise of her claimed right of termination. She is in no danger of losing the income she is entitled to under the Ground Lease. On information and belief, there has never been any interruption in payment of rent to her by Lever or his affiliates; and indeed, Grella has recently accepted an advance rent payment from Lever for the year to end February 29, 1976. Finally, if there were any default in payments of rent under the Ground Lease, the presence of Lever's Building, which Grella can repossess if and when there is a default is more than adequate security. Clearly in the circumstances of this case Grella should not be allowed to terminate the Ground Lease unless and until her right to do so here is established.

Reason For Order to Show Cause

27. FDIC makes this motion by order to show cause in order to apply for a temporary restraining order, which may be essential to prevent unwarranted eviction from the Ground.

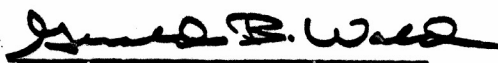
28. No previous application has been made for the relief requested herein.

WHEREFORE, plaintiff respectfully prays that an order be entered granting the requested preliminary injunctive relief.

  
Kalman A. Oravetz

Sworn to before me this

21st day of February, 1975



Notary Public

DEALD B. WALL  
Notary Public, County of ...

Exhibit 2 Annexed to Affidavit of Kalman A. Oravetz  
(Assignment and Subleases dated December 9, 1963)





### Repairs— Floor Level

## Window Closing

## Requirements of Law

1. NAME

Subordination 7. This lease is subject and subordinate to all ground or underlying leases and to all encumbrances which may now or hereafter exist such leases or the real property of which devised premises form a part, and to all renewals, modifications, consolidations, replacements and extensions thereof. This clause shall be self-operative and no further instrument of subordination shall be required by any mortgagee. Confirmation of such subordination. Tenant shall execute promptly any certificate that Landlord may request. Tenant hereby consents and appoints Landlord the Tenant's attorney-in-fact to execute any such certificate or certificates for and on behalf of Tenant.

Property—  
Lena. Durnova.  
Nikolai Durnov.

Destroyed—  
Fire or  
Other Cause

9. If the demised premises shall be partially damaged by fire or other cause within the term or term of years herein expressed, or if the premises shall be partially damaged by fire or other cause within the term or term of years herein expressed, the lease shall nevertheless remain in full force and effect, and the lessee shall be bound to rebuild or repair the same within the time specified in the lease, and the lessor shall be bound to pay the cost of such rebuilding or repair.

according to the part of the demised premises which is destroyed or damaged. But if such partial damage is due to the fault or neglect of Tenant, Tenant's servants, employees, agents, visitors or licensees, no such premises is any other rights and remedies of Landlord and without prejudice to the rights of subrogation of Landlord, the damages shall be limited by the amount of such partial damage. No opportunity or abatement of rent shall occur for a reasonable delay which may arise by reason of adjustment of insurance on the part of Landlord and/or Tenant, and for reasonable delay on account of "labor troubles", or any other cause beyond Landlord's control. If the demised premises are totally damaged or are rendered wholly untenantable by fire or other cause, and if Landlord shall decide not to restore or not to rebuild the same, or if the building shall be so damaged that Landlord shall decide to demolish it or to rebuild it, then or in any of such events Landlord may, within ninety (90) days after such fire or other cause, give Tenant a notice in writing of such decision, which notice shall be given as in Article 27 hereof provided, and thereupon the term of this lease shall expire by lapse of time upon the third day after such notice is given, and Tenant shall vacate the demised premises and surrender the same to Landlord. If Tenant shall not be in default under this lease then, upon the termination of this lease under the conditions provided for in the sentence immediately preceding, Tenant's liability for rent shall cease as of the day following the casualty. Tenant hereby expressly waives the provisions of Section 227 of the Real Property Law and agrees that the foregoing provisions of this Article shall govern and control in lieu thereof. If the damage or destruction be due to the fault or neglect of Tenant the debris shall be removed by, and at the expense of, Tenant.

#### Eminent Domain

18. If the whole ~~demised premises~~ the demised premises shall be acquired or condemned by Eminent Domain for any public or quasi public use or purpose, then and in that event, the term of this lease shall cease and terminate from the date of title vesting in such proceeding and Tenant shall have no claim against Landlord for the value of any unexpired term of said lease.

#### Assignment, Mortgage, Etc.

19. Tenant, for itself, its heirs, distributees, executors, administrators, legal representatives, successors and assigns, expressly covenants that it shall not assign, mortgage or encumber this agreement, nor underlet, or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of Landlord in each instance. If this lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than Tenant, Landlord may, after default by Tenant, collect from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment, underletting, occupancy or collection shall be deemed a waiver of this covenant, or the obligations of the assignee, under-tenant or occupant as tenant, or a release of Tenant from the further performance by Tenant of covenants on the part of Tenant herein contained. The consent by Landlord to an assignment or underletting shall not in any wise be construed to relieve Tenant from obtaining the express consent in writing of Landlord to any further assignment or underletting.

#### Electric Current Etc.

#### Access to Premises

20. Tenant shall permit Landlord to erect, use and maintain, pipes and conduits in and through the demised premises. Landlord or Landlord's agents shall have the right to enter the demised premises at all times to examine the same, and to make decorations, repairs, alterations, improvements or additions on Landlord may deem necessary or desirable, and Landlord shall be allowed to take all material into and upon said premises that may be required therefor without the same constituting an eviction of Tenant in whole or in part and the rent reserved shall in no wise abate while said decorations, repairs, alterations, improvements, or additions are being made, by reason of loss or interruption of business of Tenant, or otherwise. During the six months prior to the expiration of the term of this lease, or any renewal term, Landlord may exhibit the premises to prospective tenants or purchasers, and place upon said premises the usual notices "To Let" or "For Sale" which notices Tenant shall permit to remain thereon without molestation. If, during the last month of the term, Tenant shall have renewed all or substantially all of Tenant's property thereon, Landlord may immediately enter and alter, remove and redecorate the demised premises, without elimination or abatement of rent, or incurring liability to Tenant for any compensation, and such acts shall have no effect upon this lease. If Tenant shall not be personally present to open and permit an entry into said premises, at any time, when for any

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 21. It is stipulated and agreed that in the event A the termination of this lease pursuant to (a) or (b) hereof, Landlord shall forthwith, notwithstanding any other provisions of this lease to the contrary, be entitled to recover from Tenant as and for liquidated damages an amount equal to the difference between the amount reserved hereunder for the unexpired portion of the term demised and the then fair and reasonable rental value of the demised premises for the same period. In the computation of such damages the difference between any installment of rent becoming due hereunder after the date of termination and the fair and reasonable rental value of the demised premises for the period for which such installment was payable shall be deducted to the date of termination at the rate of four per cent (4%) per annum. If such premises or any part thereof be re-let by the Landlord for the unexpired term of said lease, or any part thereof, before presentation of proof of such liquidated damages to any court, commission or tribunal, the amount of rent reserved upon such re-letting shall be prima facie to be the fair and reasonable rental value for the part or the whole of the premises so re-let during the term of the re-letting. Nothing herein contained shall limit or prejudice the right of the Landlord to prove for and obtain as liquidated damages by reason of such termination, an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, such damages are to be proved, whether or not such amount be greater, equal to, or less than the amount of the difference referred to above.

#### Default

17. (1) If Tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent, or if the demised premises become vacant or deserted, or if the demised premises are damaged by reason of negligence or carelessness of Tenant, its agents, employees or invitees, then, in any one or more of such events, upon Landlord serving a written five (5) days notice upon Tenant specifying the nature of said default and upon the expiration of said five (5) days, if Tenant shall have failed to comply with or remedy such default, or if the said default or omission complained of shall be of such a nature that the same cannot be completely cured or remedied within said five (5) day period, and if Tenant shall not have diligently commenced curing such default within such five (5) day period, and shall not thereafter with reasonable diligence and in good faith strived to remedy or cure such default, then Landlord may serve a written three (3) days' notice of cancellation of this lease upon Tenant, and upon the expiration of said three (3) days, this lease and the term hereunder shall end and expire as fully and completely as if the date of expiration of said three (3) day period were the day herein definitely fixed for the end and expiration of this lease and the term thereof and Tenant shall then quit and surrender the demised premises to Landlord but Tenant shall remain liable as a reletting provided.

(2) If the notice provided for in (1) hereof shall have been given, and the term shall expire as aforesaid or (2a) if Tenant shall make default in the payment of the rent reserved herein or any item of additional rent herein mentioned or any part of either or in making any other payment herein provided; or (2b) if any execution or attachment shall be issued against Tenant or any of Tenant's property whereupon the demised premises shall be taken or occupied or attempted to be taken or occupied by someone other than Tenant; or (2c) if Tenant shall make default with respect to any other lease between Landlord and Tenant; or (2d) if Tenant shall fail to move into or take possession of the premises within fifteen (15) days after commencement of the term of this lease, of which fact Landlord shall be the sole judge; then and in any of such event Landlord may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of demised premises and remove their effects and hold the premises as if this lease had not been made, and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end, if Tenant shall make default hereunder prior to the date fixed as the commencement of any renewal or extension of this lease, Landlord may cancel and terminate such renewal or extension, agreement by written notice.

#### Remedies of Landlord

19. In case of any such default, re-entry, expiration and/or dispossession by summary proceedings or otherwise, (a) the rent shall become due thereupon and be paid such expenses as Landlord may incur for legal expenses, attorneys' fees, brokerage, and/or putting the demised premises in good order, or the proportion of the same for re-rental; (b) Landlord may re-let the premises or any part or parts thereof, either in the name of Landlord or otherwise, for a term or terms, which may or may not be less than or exceed the period which would otherwise have constituted the balance of the term of this lease and may grant concessions or free rent and/or (c) Tenant or the legal representatives of Tenant shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants



and premises the usual notices "To Let" or "For Sale" which notices Tenant shall permit to remain thereon without molestation. If, during the last month of the term, Tenant shall have removed all or substantially all of Tenant's property therefrom, Landlord may immediately enter and clear, remove and relocate the demised premises, without limitation or abatement of rent, or incurring liability to Tenant for any consequential, and such acts shall have no effect upon this lease. If Tenant shall not be personally present to open and permit an entry into and premises, at any time, when for any reason an entry therein shall be necessary or permissible, Landlord or Landlord's agents may enter the same by a master key, or may forcibly enter the same, without molesting Landlord or such agents liable therefor (if during such entry Landlord or Landlord's agents shall exercise reasonable care to Tenant's property), and without in any manner affecting the obligations and covenants of this lease. Nothing herein contained, however, shall be deemed or construed to impose upon Landlord any obligation, responsibility or liability whatsoever, for the care, supervision or repair, of the building or any part thereof, other than as herein provided. Landlord shall also have the right at any time, without the same constituting an actual or constructive eviction and without incurring any liability to Tenant therefor, to change the arrangement and/or location of entrances or passageways, doors and doorways, and corridors, elevators, stairs, toilets, or other public parts of the building and to change the name, number or designation by which the building is commonly known.

**Vaults.** 14. No vaults, vault space or space not within the property line of the building is leased hereunder, anything contained in or indicated on any sketch, blueprint or plan, or anything contained elsewhere in this lease to the contrary notwithstanding, Landlord makes no representation as to the location of the property line of the building. All vaults and vault space and all space not within the property line of the building, which Tenant may be permitted to use and/or occupy, is to be used and/or occupied under a revocable license, and if any such license be revoked, or if the amount of such space be diminished or required by any Federal, State, Municipal Authority or Public Utility, Landlord shall not be subject to any liability nor shall Tenant be entitled to any compensation or diminution or abatement of rent, nor shall such revocation, diminution or requisition be deemed constructive or actual eviction. Any fee or charge of municipal authorities for such vault shall be paid by Tenant.

**Certificate of Occupancy.** 15. Tenant will not at any time use or occupy the demised premises in violation of the certificate of occupancy issued for the building of which the demised premises form a part. The statement in this lease of the nature of the business to be conducted by Tenant in demised premises shall not be deemed or construed to constitute a representation or warranty by Landlord that such business may be conducted in the demised premises or is lawful or permissible under the certificate of occupancy issued for the building of which the demised premises form a part, or otherwise permitted by law.

**Bankruptcy.** 16. (a) If at any time prior to the date herein fixed as the commencement of the term of this lease there shall be filed by or against Tenant in any court pursuant to any statute either of the United States or of any State a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or a portion of Tenant's property, and within thirty (30) days thereof Tenant fails to secure a discharge thereof, or if Tenant make an assignment for the benefit of creditors, or petition for or enter into an arrangement this lease shall ipso facto be cancelled and terminated and in which event neither Tenant nor any person claiming through or under Tenant or by virtue of any statute or of an order of any court shall be entitled to possession of the demised premises and Landlord, in addition to the other rights and remedies given by (c) hereof and by virtue of any other provision herein or elsewhere in this lease contained or by virtue of any statute or rule of law, may retain as liquidated damages any rent, security, deposit or monies received by him from Tenant or others in Sublet of Tenant upon the execution hereof.

(b) If at the date fixed as the commencement of the term of this lease or if at any time during the term hereby demised there shall be filed by or against Tenant in any court pursuant to any statute either of the United States or of any State a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or a portion of Tenant's property, and within thirty (30) days thereof Tenant fails to secure a discharge thereof, or if Tenant make an assignment for the benefit of creditors, or petition for or enter into an arrangement this lease, at the option of Landlord, exercised within a reasonable time after notice of the happening of any one or more of such events, may be cancelled and terminated and in which event neither Tenant nor any person claiming through or under Tenant by virtue of any statute or of an order of any court shall be entitled to possession or to remain in possession of the premises demised but shall forthwith quit and surrender the premises, and Landlord, in addition to the other rights and remedies Landlord has by virtue of any other provision herein or elsewhere in this lease contained or by virtue of any statute or rule of law, may retain as liquidated damages any rent, security, deposit or monies received by him from Tenant or others in behalf of Tenant.

(c) During Term

however, and/or putting the demised premises in good order, or for preparing the same for re-letting (b) Landlord may re-let the premises or any part or parts thereof, either in the name of Landlord or otherwise, for a term or terms, which may at Landlord's option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease and may grant concessions or free rent and/or (d) Tenant or the legal representatives of Tenant shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure or refusal of Landlord to re-let the premises or any part or parts thereof shall not release or affect Tenant's liability for damages. In computing such liquidated damages there shall be added to the said deficiency such expenses as Landlord may incur in connection with re-letting, such as legal expenses, attorneys' fees, brokerage and for keeping the demised premises in good order or for preparing the same for re-letting. Any such liquidated damages shall be paid in monthly installments by Tenant on the rent day specified in this lease and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any way the rights of Landlord to collect the deficiency for any subsequent month by a similar proceeding. Landlord or Landlord's agent may make such alterations, repairs, replacements and/or decorations in the demised premises as Landlord in Landlord's sole judgment considers advisable and necessary for the purpose of re-letting the demised premises and the making of such alterations and/or decorations shall not operate or be construed to release Tenant from liability hereunder as aforesaid. Landlord shall in no event be liable in any way whatsoever for failure to re-let the demised premises, or in the event that the demised premises are re-let for failure to collect the rent thereof under such re-letting. In the event of a breach or threatened breach by Tenant of any of the covenants or provisions hereof, Landlord shall have the right of forfeiture and the right to invoke any remedy allowed at law or in equity as if re-entry, summary proceedings and other remedies were not herein provided for. Mention in this lease of any particular remedy, shall not preclude Landlord from any other remedy, in law or in equity. Tenant hereby expressly waives any and all rights of redemption arising by or under any present or future laws in the event of Tenant being evicted or dispossessed for any cause, or in the event of Landlord obtaining possession of demised premises, by reason of the violation by Tenant of any of the covenants and conditions of this lease, or otherwise.

**Fees and Expenses.** 19. If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, Landlord may immediately or at any time thereafter and without notice perform the same for the account of Tenant, and if Landlord makes any expenditures or incurs any obligations for the payment of money in connection therewith including, but not limited to, attorneys' fees in instituting, prosecuting or defending any action or proceeding such sums paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Landlord within five (5) days of rendition of any bill or statement to Tenant therefor.

**No Representations by Landlord.** 20. Landlord or Landlord's agents have made no representations or promises with respect to the said building, the land upon which it is erected or demised premises except as herein expressly set forth and no rights, easements or licenses are acquired by Tenant by implication or otherwise except as expressly set forth in the provisions of this lease. The taking possession of the demised premises by Tenant shall be conclusive evidence, as against Tenant, that Tenant accepts same "as is" and that said premises and the building of which the same form a part were in good and satisfactory condition at the time such possession was so taken.

**End of Term.** 21. Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Landlord the demised premises, broom clean, in good order and condition, ordinary wear excepted, and Tenant shall remove all of its property. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of the term of this lease. If the last day of the term of this lease or any renewal thereof falls on Sunday this lease shall expire on the business day immediately preceding. If Landlord elects to treat Tenant as a hold-over for a further term of one year, any covenant of rent or agreement in respect of decorations or the like in the initial term shall not apply to such hold-over term or terms.


**Quiet Enjoyment.** 22. Landlord covenants and agrees with Tenant that upon Tenant paying the rent and additional rent and observing and performing all the terms, covenants and conditions, no Tenant's part to be observed and performed, Tenant may peaceably and quietly enjoy the premises hereby demised, subject, nevertheless, to the terms and conditions of this lease including, but not limited to, Articles 12 through 21 and to the ground leases, underlying leases and mortgages hereunder mentioned.



STATE OF NEW YORK     )  
                              : SS.:  
COUNTY OF NASSAU     )

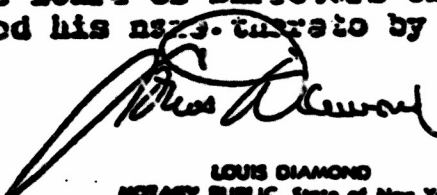
A 117

On the 9th day of December, 1963, before me personally came LAWRENCE LEVER to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

  
LOUIS DIAMOND  
NOTARY PUBLIC, State of New York  
No. 41-6016903  
Qualified in Queens County  
Term Expires March 30, 1964

STATE OF NEW YORK     )  
                              : SS.:  
COUNTY OF NASSAU     )

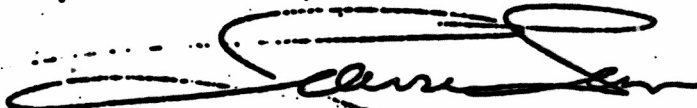
On the 9th day of December, 1963, before me personally came LAWRENCE LEVER to me known, who, being by me duly sworn, did depose and say that he resides at No. 10 Atkinson Road, Rockville Centre, New York; that he is the President of MINICOLA OFFICE BUILDING INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
LOUIS DIAMOND  
NOTARY PUBLIC, State of New York  
No. 41-6016903  
Qualified in Queens County  
Term Expires March 30, 1964

KNOW ALL MEN BY THESE PRESENTS, that I, LAWRENCE LEVER of 99 West Hawthorne Avenue, Valley Stream, New York, hereinafter called the "Assignor", for value received, do hereby assign, transfer and set over unto NINEOLA OFFICE BUILDING INC., a New York corporation having its office and principal place of business at 99 West Hawthorne Avenue, Valley Stream, New York, hereinafter called the "Assignee", the following contract and all of the Assignor's right, title and interest therein: Contract dated November 1st, 1932 between The Franklin National Bank of Long Island as Seller, and Lawrence Lever as Purchaser, and the Assignor does hereby direct the said Seller to make, execute and deliver to the said Assignee the Primary Sub-Lease, the Secondary Sub-Lease and the Deed referred to in said contract, together with any related papers.

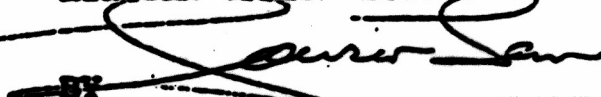
And the Assignee does hereby assume the performance of all the terms and conditions of said contract.

IN WITNESS WHEREOF, this Assignment and Assumption Agreement has been executed by the Assignor and Assignee this 2th day of December, 1933.



LAWRENCE LEVER

NINEOLA OFFICE BUILDING INC.



BY

AGENT

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**LAWRENCE LEVER,**

**Assignor**

**-to-**

**MINEOLA OFFICE BUILDING INC.**

**Assignee**

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**ASSIGNMENT AND  
ASSUMPTION OF CONTRACT**  
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**WOLFF & DIAMOND  
COUNSELORS AT LAW  
100-16 JAMAICA AVENUE  
JAMAICA 32, N. Y.**

A120

**MEMORANDUM OF LEASE** pursuant to Section 291-C of the  
Real Property Law of the State of New York, between ~~THE~~  
~~FRANKLIN NATIONAL BANK OF LONG ISLAND~~, a National Banking  
Corporation with an office at No. 925 Hempstead Turnpike,  
Franklin Square, New York, as Lessor, and MINEOLA OFFICE  
BUILDING INC., a New York corporation with office at No. 99  
West Hawthorne Avenue, Valley Stream, Nassau County, New York  
as Lessee.

Name of Lessor: ~~THE FRANKLIN NATIONAL BANK OF LONG ISLAND~~,  
a National Banking Corporation.

Address of Lessor: 925 Hempstead Turnpike, Franklin Square,  
New York.

Name of Lessee: MINEOLA OFFICE BUILDING INC., a New York  
Corporation.

Address of Lessee: 99 West Hawthorne Avenue, Valley Stream,  
New York.

Date of Execution of Lease: The 9th day of December, 1963.

Description of Leased Premises in the Form Described in the  
Lease:

ALL that certain plot, piece or parcel of land,  
situate, lying and being in the Incorporated Village  
of Mineola, Town of North Hempstead, County of Nassau  
and State of New York, known and designated as Part  
of Lot Numbers 4, 5, 6, 7, and all of 14, 15, 16 and  
17 on a certain map entitled, "Map of Property belong-  
ing to Eastman & Hicks, situate at Mineola, Long Is-  
land, February 26, 1887 by William E. Hawthurst, Sur-  
veyor," and filed in the Office of the Clerk of the  
County of Queens on July 20, 1887 as Map No. 355,  
and filed in the Office of the Clerk of the County  
of Nassau as Map No. 120, Case No. 1196, bounded and  
described as follows:

BEGINNING at a point on the new Northerly side of  
Old Country Road distant 149.43 feet Easterly from  
the corner formed by the intersection of the new  
Northerly side of Old Country Road with the Wester-  
ly side of Roslyn Road (Albertson Avenue); RUNNING  
THENCE Northerly on a line which forms an interior  
angle with the new Northerly side of Old Country  
Road of 29 degrees 29 minutes 54 seconds a distance  
of 197.90 feet to the Southerly side of Third Street;  
THENCE Easterly along the Southerly side of Third  
Street 200 feet; THENCE Southerly on a line which  
forms an interior angle of 90 degrees with the South-  
erly side of Third Street 196.16 feet to the new  
Northerly side of Old Country Road; THENCE RUNNING

Easterly along the new Northerly side of Old Country Road, 200.01 foot to the point or place of BEGINNING.

**Term of Lease:** For a term of seventeen (17) years, two (2) months and nineteen (19) days, the date of the commencement of such term being the 9th day of December, 1963 and the date of termination of such term being the 27th day of February, 1981.

**Right of Extension or Renewal:** The Lessee shall have four (4) separate rights of renewal, each renewal to be for a term of twenty (20) years to be exercised by the Lessee by serving notice in writing on the Lessor at least nine (9) months before the expiration of the previous term. Lessor agrees upon receipt of such notice from the Lessee to serve a notice in writing on the holder of the major lease dated April 4, 1961, a Memorandum of which was recorded in the Nassau County Clerk's Office on April 27, 1961 in Liber 6850 of Conveyances Page 262, within thirty (30) days after the receipt of such notice from Lessee exercising the right of the Lessor herein as the Lessee under such major lease as to the right of renewal.

**Right to Mortgage Lease:** As to lease dated the 9th day of December, 1963, the Lessee shall have the right to mortgage such lease. Such mortgage may, at Lessee's option, cover the demised premises alone or with other real property in the vicinity thereof or on the opposite side of any street. In confirmation of such authority Lessor shall execute any certificate of such authority as to the same that the Lessee may request. The Lessor agrees to execute or join with the Lessee in the execution of any papers which any mortgagee may reasonably require of the Lessor and which are normally and customarily required by the lending institution in loans of such type, without cost to the Lessor except that the Lessor shall not be required to join in the bond or mortgage or any subordination.

**Right of Assignment of Lease:** The Lessee shall have the right to assign this lease to an individual or corporation or to more than one individual or corporation. However, upon the mailing by registered or certified mail of the duplicate original of such assignment in writing to Lessor and if the same be accompanied by an assumption agreement executed by such Assignee wherein such Assignee assumes the performance of all the terms and conditions of the lease and of any sub-lease by the Lessee therein to the Lessor therein, both in due form for recording, the Lessee therein shall, ipso facto, be released and relieved from all further liability under said lease and under said sub-lease. The Assignee in such assignment need not assume the performance of all the terms and conditions of the sub-lease this day entered into between LINCOLN OFFICE BUILDING INC., as Landlord, and THE FARMERS NATIONAL BANK OF LONG ISLAND, as Tenant, concerning a portion of the building called for thereby. In the event an

assignee does not assume the performance of all the terms and conditions of said lease and of any sub-lease by the Lessee therein to the Lessor therein, the liability of the last assignee who may have assumed such performance shall continue and remain unaffected by such assignment until there be an assignee who shall assume such performance.

IN WITNESS WHEREOF, the parties hereto have respectively executed this Memorandum of Lease this 9th day of December, 1963.

~~THE FRANKLIN NATIONAL BANK~~  
~~OF LONG ISLAND~~

BY James A. V. P.

MINEOLA OFFICE BUILDING INC.


BY [Signature]  
President



STATE OF NEW YORK )  
: SS.:  
COUNTY OF NASSAU )

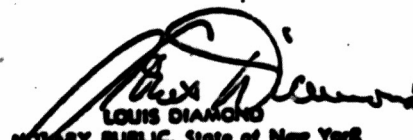
A 123

On the 9th day of December, 1963, before me personally came JOHN SADLIK to me known, who, being by me duly sworn, did depose and say that he resides at No. 116-15 45th Road, FRESHING, NEW YORK; that he is the Vice-President of ~~THE~~ FRANKLIN NATIONAL BANK OF LONG ISLAND, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
LOUIS DIAMOND  
NOTARY PUBLIC, State of New York  
No. 41-6016900  
Qualified in Queens County  
Term Expires March 30, 1964

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NASSAU )

On the 9th day of December, 1963, before me personally came LAWRENCE LEVER to me known, who, being by me duly sworn, did depose and say that he resides at No. 10 Atkinson Road, Rockville Centre, New York; that he is the President of MINOLA OFFICE BUILDING INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

  
LOUIS DIAMOND  
NOTARY PUBLIC, State of New York  
No. 41-6016900  
Qualified in Queens County  
Term Expires March 30, 1964



**THE FRANKLIN NATIONAL BANK  
OF LONG ISLAND,**

**Lessor**

**-with-**

**MINEOLA OFFICE BUILDING INC.**

**Lessee**

-----  
**MEMORANDUM OF LEASE**  
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**WOLFF & DIAMOND  
COUNSELORS AT LAW  
100-16 JAMAICA AVENUE  
JAMAICA 32, N. Y.**

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Signs

36. The Landlord also reserves to itself the sole right to designate the person, firm or corporation which shall do the work at Tenant's expense of lettering and erecting of any and all signs to be affixed to the premises or the building. In the event that said work is done by the Tenant through any person, firm or corporation other than that designated by the Landlord, the Landlord is hereby given the right to remove said signs without being liable to the Tenant by reason thereof and to charge the cost of so doing to the Tenant as additional rent payable on the first day of the next following month, or at Landlord's option, on the first day of any subsequent month.

Air-  
Conditioning  
and Cooling

37. The Landlord will install within the building of which the demised premises are a part, machinery, appliances, equipment and appurtenances for the operation and maintenance of a modern peripheral air-conditioning system for the demised premises separately. It is expressly agreed by the Tenant that in order for the system to function properly, the Tenant is obliged to, and the Tenant agrees to, keep all windows in the premises closed. Subject always to events and causes, physical, mechanical and otherwise, beyond the reasonable control of the Landlord, for the failure of which the Landlord shall not be liable in any event whatever, the Landlord will service and maintain said air-conditioning for the premises on business days generally during the hours of 9:00 A. M. to 5:00 P. M. on Monday through Friday of each week during the months of June, July, August and September, exclusive of holidays. Any damage caused to said appliances, equipment or appurtenances as a result of the negligence of, or the careless operation by the Tenant or the agents, servants, employees, licensees or invitees of the Tenant, shall be repaired by the Landlord at the cost and expense of the Tenant. Any such expense shall constitute additional rent. (Continued in paragraph "62" hereof)

Plate Glass

38. The Tenant shall repair, at its own expense, all damage or destruction of any plate glass in the demised premises. If the Tenant fails to repair the damage of any plate glass on the demised premises then the Landlord may repair said damage or destruction or may insure the plate glass and charge the cost of such repairing or the cost of premium for the plate glass insurance to the Tenant, and the amount thereof shall be deemed to be, and be paid, as additional rent.

Sprinklers

39. If (at Landlord's election) there shall be installed in the building a "sprinkler system", and such system or any of its appliances shall be damaged or not in proper working order by reason of any act or omission of Tenant, Tenant's agents, servants, employees, licensees or visitors, Tenant shall forthwith at Tenant's own expense, restore the same to good working condition; and if the New York Board of Fire Underwriters or the New York Fire Insurance Exchange or any bureau, department or official of the State or City government, require or recommend that any changes, modifications, alterations or additional sprinkler boxes or other

equipment, be made or supplied by reason of Tenant's business, or the location of partitions, trade fixtures, or other contents of the demised premises, or if any such changes, modifications, alterations, additional sprinkler heads or other equipment, become necessary to prevent the imposition of a penalty or charge against the full allowance for a sprinkler system in the fire insurance rate as fixed by said Exchange, or by any Fire Insurance Company, Tenant shall, at Tenant's expense, promptly make and supply such changes, modifications, alterations, additional sprinkler heads or other equipment. In the event Landlord installs a sprinkler system in the demised premises Tenant shall pay to Landlord as additional rent, on the first day of each month during the term of this lease in advance, \$.0195 as the Tenant's portion of the contract price for sprinkler supervisory service of the entire building of which the demised premises forms a part.

Notices,  
Bills and  
Statements

40. Should the term "Tenant" as used in this lease, refer to more than one person, any notice, bill or statement given or sent as aforesaid to any one of such persons shall be deemed to have been duly given or sent to the Tenant.

Brokers

41. The parties herein agree that no broker brought about or had any connection with the procuring, execution and delivery of this lease.

Reserve  
Right to  
Shift

42. Tenant shall require all of its personnel to park their vehicles only in areas from time to time designated by the Landlord as the areas for such parking which shall be either near the building of which the demised premises forms a part or in the same block or in any adjacent block, the Landlord reserving the right at all times to re-designate such areas. Tenant and any assignee or sub-tenant, within five (5) days upon written demand by the Landlord, shall furnish Landlord, or its authorized agent with State automobile license number assigned to its automobile or automobiles and the automobiles of all of its employees employed in the premises. Tenant, its assignee and sub-tenants shall not at any time park any trucks or any delivery vehicles in the parking areas. The size of the area or areas to be allocated by the Landlord for the use of its Tenants shall be such as the Landlord shall in Landlord's own judgment determine and shall be for ten (10) pleasure-car automobiles.

Work By  
Tenant

43. All work that the Tenant does or shall do in the demised premises shall be done with union labor and materials only, and shall at all times conform to the standards of the building and shall comply with all rules and regulations of the municipal authorities having jurisdiction thereof, and shall be free of all mechanic's liens and all conditional bills of sale.

Electricity

44. Electric current required in conjunction with elevators, common stairways and common halls shall be Landlord's obligation. Tenant shall, at Tenant's own expense, furnish all other electric current including but not limited to current for air-conditioning system, as the Tenant may require in the demised premises for the purpose for which the premises are leased and the cost of installation of any motor or motors in connection therewith. The Tenant shall, at its own cost and expense supply electric light bulbs and fluorescent tubes and any replacements thereof. The Landlord shall have no responsibility for failure to supply the electric

current first above mentioned when prevented from doing so by strikes, repairs, alterations or improvements or by reason of the failure of the public utility to furnish electric current to the landlord or for any cause beyond the Landlord's reasonable control, or by orders or regulations of any federal, state, county or municipal authority; and that the Landlord's obligation to furnish such electricity shall not be deemed breached nor shall there be any abatement in rent or any liability on the part of the Landlord to the Tenant for failure to furnish such electricity for the reasons herein set forth. Anything hereinbefore contained to the contrary notwithstanding, the Tenant agrees to purchase from the Landlord all fluorescent tubes and bulbs to be used in the demised premises at manufacturer's list price and the Landlord agrees to install the same at no additional charge.

45. It is expressly understood and agreed by and between the parties hereto that the Tenant herein shall not be entitled to any abatement of rent or rental value or diminution of rent in any dispossession proceedings for the non-payment of rent by reason of any breach by the Landlord of any covenants contained in this lease on its part to be performed, and in any dispossession proceedings for non-payment of rent the Tenant shall not have the right of set-off by way of damages, recoupment or counter-claim in damages which the Tenant may have sustained by reason of the Landlord's failure to perform any of the terms, covenants and conditions contained in this lease on its part to be performed, but the said Tenant shall be relegated to an independent action for damages, and such independent action shall not at any time be joined or consolidated with any action for dispossession or for non-payment of rent.

46. The Tenant shall keep the demised premises in a neat and clean condition, and at the expiration of this lease shall return the same broom-clean and in as good state and condition as reasonable wear and tear thereof will permit.

47. The Tenant shall, throughout the term hereof, at the Tenant's own expense, provide for the benefit of the Landlord, Landlord's contingent liability policy in \$500,000/\$1,000,000 limits as to personal injuries or death and \$100,000.00 as to property damage and covering the leased premises. The insured under said policy may be the Landlord as well as the Tenant herein as their respective interests may appear. The original or a certificate thereof and all renewal policies or certificates thereof evidencing such insurance, shall be deposited with the Landlord, it being understood that each such renewal policy or certificate thereof shall be so deposited at least ten (10) days prior to the expiration of the insurance which it is to replace and/or renew and in default thereof the Landlord may obtain such insurance and collect the premium thereon as additional rent.

48. This lease shall not be modified in any manner whatsoever, except by an instrument in writing signed by the Landlord and Tenant; and this lease evidences the entire agreement of the parties hereto.

49. (a) For the purpose of this Article "49" the term "lease year" shall mean the period of twelve months or less commencing with the term commencement date and ending the following December 31st, each successive period of twelve months thereafter during the term, and the final period of twelve months or less commencing with January 1st immediately pre-

Provisions  
Against  
Off-Set or  
Counterclaim

Clean  
Condition

Liability  
Policy

Requirement  
for Modifi-  
cations To  
Be In Writing

Escalator  
Clause



ceding the expiration of the term.

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(b) In the event that the real estate taxes payable with respect to the building and the land on which it is located, and on any auxiliary parking area, for any tax year in which this lease shall be in effect shall be greater than the amount of such taxes due and payable on the first anniversary date of the date of the issuance of the Certificate of Occupancy (the applicable tax year being hereinafter referred to as "Base Year"), whether by reason of an increase in either the tax rate or the assessed valuation or by reason of the levy, assessment or imposition of any tax on real estate as such, not now levied, assessed or imposed, or for any other reason, Tenant shall pay to Landlord within thirty (30) days after the date on which each such tax or installment thereof shall be due and payable, as additional rent for the lease year in which such date occurs, an amount equal to .04195 of the difference between the amount of such tax or installment and the corresponding tax or installment paid for the Base Year.

(c) Tenant shall also pay to Landlord, within thirty (30) days after the same shall be payable by Landlord and as additional rent for the lease year in which the same shall be so payable, an amount equal to .04195 of any assessment or installment thereof for public betterments or improvements which may be levied upon the said land and building and which is not deductible from any condemnation award. Landlord shall take the benefit of the provisions of any statute or ordinance permitting any such assessment to be paid over a period of time and Tenant shall be obligated to pay only the said percentage of the installments of any such assessments which shall become due and payable during the term of this lease.

(d) In the event that the operating expenses (as hereinafter defined) incurred by Landlord during any lease year (or during any calendar year of which a lease year of less than twelve months shall be a part) shall be greater than the operating expenses incurred by Landlord during the ~~year of either (i) the calendar year in which the building shall first be operated as a completed building or (ii) the calendar year next preceding the term commencement date,~~ Tenant shall pay to Landlord as additional rent for the lease year in question, on or before the first day of April next succeeding such lease year, an amount equal to .04195 of the increase. For the purpose of this paragraph (d), "operating expenses" shall mean any or all of the following incurred by Landlord with respect to the building of which the demised premises form a part: salaries, wages, medical, surgical and general welfare benefits (including group life insurance) and pension payments of employees of Landlord engaged in the operation and maintenance of the building of which the demised premises are a part, payroll taxes, workmen's compensation insurance, electricity, steam, utility taxes, water (including sewer rental), casualty and liability insurance, repairs and maintenance, building and cleaning supplies, uniforms and dry cleaning, window cleaning, management fees not in excess of the regular rates prescribed by the Real Estate Board of New York, Inc., service contracts with independent contractors, telephone, telegraph, stationery, advertising, and all other expenses paid in connection with the operation of said premises properly chargeable against

\*\* calendar year following the year in which the building shall first be operating as a completed building.

income. Landlord, upon written demand by Tenant therefor but not sooner than ninety (90) days after the expiration of a lease year, shall furnish Tenant with a summary schedule of such operating expenses for such lease year if there shall occur therein an increase in operating expenses as aforesaid.

(c) If the first or the final lease years shall contain less than twelve (12) months, the additional rent payable under this Article "49" for such lease years shall be pro-rated. Tenant's obligation to pay additional rent for the final lease year shall survive the expiration of the term of this lease.

Non-Obligation  
of Landlord  
as to Clean-  
ing Services

50. Landlord shall be under no obligation to clean windows, to dust or to otherwise clean the demised premises, or to remove any waste therefrom, or to wax any floors.

Non-  
Obstruction  
of Window  
Sills

51. Tenant agrees to keep the window sills in the demised premises free of any articles, and further agrees not to place anything on the floor of said premises which will obstruct the cleaning of the windows from the interior of the offices.

Hours For  
Tenant's  
Moving

52. It is agreed that any moving of furniture or equipment into or out of the demised premises must be done by the Tenant after normal business hours, subject to prior consent of the Landlord. In this respect, normal business hours shall be 8:00 A. M. to 5:00 P. M. from Monday through Friday and 8:00 A. M. to 1:00 P. M. Saturday. Such moving shall be accomplished by Tenant at Tenant's expense by licensed movers only and if by elevator such moving be not in excess of its carrying load capacity.

Special Taxes  
Against  
Tenant

53. Tenant shall be responsible for and shall pay before delinquency all municipal, county or state taxes assessed during the term of this lease against any household interest or personal property of any kind, owned by or placed in, upon or about the leased premises by the Tenant.

Tenant's Ob-  
ligation As  
to Services  
and Utilities

54. All services and utilities exclusive of those which the Landlord specifically provides for herein, are to be deemed part of the obligation and expense of the Tenant.

Non-Recording  
of Lease by  
Tenant

55. Tenant expressly warrants and represents that it will not record this lease.

Delay In  
Possession  
and Commence-  
ment of Term

56. Anything hereinbefore contained to the contrary notwithstanding, the term of this lease shall commence ten (10) days from the time of the mailing of a Notice by the Landlord to the Tenant stating that the premises demised herein has been completed accompanied by either a Temporary or Permanent Certificate of Occupancy, or photostatic copy thereof and such term shall be for the balance of the month remaining of the month in which such commencement date occurs and shall terminate February 27th, 1951. After such notice is given the Landlord and Tenant agree, upon the request of either, to enter into an agreement only fixing the commencement date and expiration date of the term of this lease. The issuance of a temporary or permanent Certificate of Occupancy shall be deemed conclusive evidence that the demised premises have been fully completed and possession thereof is ready and available for occupancy by the Tenant. Rent for the balance of the month in which such notice is given, calculated

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ten (10) days from the time of the giving of such notice, shall be paid on the 1st day of the month immediately following the expiration date of such ten (10) day notice.

Landlord's  
Title to In-  
stallations  
by Landlord

57. Any partitions or installations that the Landlord may make whether movable or not, shall belong to the Landlord.

58. (Out)

Definition  
of Area and  
Square Feet

59. Wherever the words "area" or "square feet" have been used in this lease the same shall be measured from the outside of exterior walls to the outside of walls in public halls and if there be party partitions other than such exterior walls and public halls, then also to the center line of such party partitions.

First  
Renewal  
Option

60. In the event the Tenant is then in possession of the demised premises and is not then in default under any of the terms, covenants and conditions contained in this lease on the part of the Tenant to be kept and performed the Tenant herein is hereby given the privilege to extend the term of this lease for a period of fourteen (14) years upon the same terms, covenants and conditions as are contained in this lease except as hereinafter provided and upon the following further conditions:

(a) The Tenant shall give notice of the intention to exercise such option at least one (1) year prior to the expiration of the original term, which notice shall be signed in behalf of the Tenant by one of its officers and transmitted to the Landlord by certified or registered mail.

(b) Within thirty (30) days after the commencement of the last year of the original term the Landlord shall notify the Tenant that in the event the Tenant elects to exercise such option that its rental will be based on the average square foot rental for occupied space paid by other Tenants of the lobby floor (exclusive of this Tenant) on the commencement of the last year of the term of this lease per annum applied to the number of square feet of the demised premises and the resultant figure shall be the basic rental which the Tenant herein shall pay per annum during the renewal period in addition to items of additional rent specified in this lease if the Tenant exercises the option as hereinafter provided. In the absence of giving such notice by the Landlord to the Tenant the same shall not be considered a breach or default by the Landlord but it shall then be conclusively presumed that if the Tenant exercises the option to renew as hereinafter provided that the basic annual rent, in addition to the items of additional rent, shall be the same as provided for during the original term.

(c) After the giving of such notice or the lapse of such thirty (30) day period, the Tenant thereafter, if it intends to exercise the option to extend the term of this lease, shall give notice to the Landlord in writing, signed in behalf of the Tenant by one of its officers, by certified or registered mail, at least nine (9) months prior to the expiration of the original term of its intention to exercise the option to so extend the term of this lease.

(d) It is the intention of the provisions of this



paragraph relating to basic rent that the same shall be the greater of the basic rent originally called for under the original term or the prevailing average square foot rental of space as aforesaid at the time of the commencement of the last year of the original term of this lease.

**Second  
Renewal  
Option**

61. Having exercised the option set out in paragraph "60" hereof, the Tenant is hereby given the privilege to extend the term of this lease for a further period of ten (10) years upon the same terms, covenants and conditions as prevailed during the first extended period and upon like notices except that wherever reference is made to expiration of the original term, it shall be deemed to be expiration of the first renewal period and the basic rent for such renewal period shall be determined in like manner, that is to say, with regard to the average square foot rental paid by other tenants of the lobby floor at the beginning of the last year of the renewal term, but not less than the annual basic rent paid during the first renewal period.

**Furnishing  
Heat and Ser-  
vicing Air-  
Conditioning  
(Continuation  
of Pars. "37"  
and "29")**

62. Paragraphs "37" and "29" hereof are clarified to the extent that the Landlord will furnish heat and will service the air-conditioning system at all times that the Bank is open for business.

**Automatic  
Enlargement  
Of Term at  
Landlord's  
Option**

63. In the event at any time, prior to February 27, 1981, the Landlord exercises its option to renew its lease between the Landlord herein as Tenant and the Tenant herein as Landlord, of the premises of which the demised premises forms a part bearing even date herewith that then, and in such event, the term of this lease shall be deemed ipso facto extended for an additional period of four (4) years and one (1) day, to wit, until the 28th day of February, 1985 on the same terms and conditions and at the same rental and items of additional rent and in that event the first option under this lease expressed in the first unlettered paragraph of Article "60" hereof shall be deemed to be for a period of ten (10) years instead of fourteen (14) years.

Postponement of the date of possession of the premises by reason of the fact that the premises are located in a building being constructed and which has not been sufficiently completed to make the premises ready for occupancy or by reason of the fact that a certificate of occupancy has not been procured at any time prior to the date of possession, Landlord shall not be liable to any liability for the failure to possession on said date. Under such circumstances the rent reserved and covenanted to be paid herein shall not commence until the possession of demised premises is given or the premises are available for occupancy by Tenant, and no such failure to give possession on the date of commencement of the term shall in any wise affect the validity of this lease or the obligations of Tenant hereunder, nor shall same be construed in any wise to extend the term of this lease. If the building in which the demised premises are located is not in course of construction, and Landlord is unable to give possession of the demised premises on the date of the commencement of the term of this lease by reason of the holding over or retention of possession of any tenant, licensee or occupant or for any other reason, or if repairs, improvements or decorations of the demised premises or of the building of which said premises form a part, are not completed, so abatement or diminution of the rent to be paid hereunder shall be allowed to Tenant nor shall the validity of the lease be impaired under such circumstances. If possession is given to Tenant to enter into possession of the demised premises or to occupy premises other than the demised premises prior to the date specified as the commencement of the term of this lease, Tenant covenants and agrees that such occupancy shall be deemed to be under all the terms, covenants, conditions and provisions of this lease, except as to the covenants to pay rent. In either case rent shall commence on the date specified as the commencement of the term of this lease.

**No Waiver** 24. If there be any agreement between Landlord and Tenant providing for the cancellation of this lease upon certain provisions or contingencies, and/or an agreement for the renewal hereof at the expiration of the term first above mentioned, the right to such renewal or the execution of a renewal agreement between Landlord and Tenant prior to the expiration of such first mentioned term shall not be considered an extension thereof or a vested right in Tenant to such further term, so as to prevent Landlord from cancelling this lease and any such extension thereof during the remainder of the original term hereby granted; such privilege, if and when so exercised by Landlord, shall cancel and terminate this lease and any such renewal or extension previously entered into between said Landlord and Tenant or the right of Tenant to any such renewal or extension; any right herein contained on the part of Landlord to cancel this lease shall continue during any extension or renewal hereof; any option on the part of Tenant herein contained for an extension or renewal hereof shall not be deemed to give Tenant any option for a further extension beyond the first renewal or extended term. No act or thing done by Landlord or Landlord's agents during the term hereby demised shall be deemed an acceptance of a surrender of said premises, and no agreement to accept such surrender shall be valid unless in writing signed by Landlord. No employee of Landlord or of Landlord's agents shall have any power to accept the keys of said premises prior to the termination of the lease. The delivery of keys to any employee of Landlord or of Landlord's agents shall not operate as a termination of the lease or a surrender of the premises. In the event of Tenant at any time desiring to have Landlord sublet the premises for Tenant's account, Landlord or Landlord's agents are authorized to receive said keys for such purposes without releasing Tenant from any of the obligations under this lease, and Tenant hereby releases Landlord of any liability for loss of or damage to any of Tenant's effects in connection with such subletting. The failure of Landlord to seek redress for violation of, or to insist upon the strict performance of, any covenant or condition of this lease, or any of the Rules and Regulations set forth or hereafter adopted by Landlord, shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by Landlord of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach. The failure of Landlord to enforce any of the Rules and Regulations set forth, or hereafter adopted, against Tenant and/or any other tenant in the building shall not be deemed a waiver of any such Rules and Regulations. No provision of this lease shall be deemed to have been waived by Landlord, unless such waiver be in writing signed by Landlord. No payment by Tenant or receipt by Landlord of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than an amount of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment or rent be deemed an amended and substituted rent, and Landlord may demand such check or payment without

any elevator facilities on business days from 8:00 a.m. to 6:00 p.m. or on Saturdays from 8:00 a.m. to 1:00 p.m. and have an elevator sublet call at all other times; (b) furnish heat to the demised premises, which as required by law, on business days from 8:00 a.m. to 6:00 p.m. and on Saturdays from 8:00 a.m. to 1:00 p.m.; (c) at Landlord's expense cause the demised premises to be kept clean provided the same are kept in order by Tenant. If, however, said premises are to be kept clean by Tenant, it shall be done at Tenant's sole expense, in a manner satisfactory to Landlord and no one other than persons approved by Landlord shall be permitted to enter said premises or the building of which they are a part for such purpose. Tenant shall pay to Landlord the cost of removal of any of Tenant's refuse and rubbish from the building. Bills for the same shall be rendered by Landlord to Tenant at such time as Landlord may elect and shall be due and payable when rendered, and the amount of such bills shall be deemed to be, and be paid as, additional rent. Tenant shall, however, have the option of independently contracting for the removal of such rubbish and refuse in the event that Tenant does not wish to have same done by employees of Landlord. Under such circumstances, however, the removal of such refuse and rubbish by others shall be subject to such rules and regulations as, in the judgment of Landlord, are necessary for the proper operation of the building. Landlord reserves the right to stop service of the heating, elevator, plumbing and electric systems, when necessary, by reason of accident, or emergency, or for repairs, alterations, replacements or improvements, in the judgment of Landlord desirable or necessary to be made, until said repairs, alterations, replacements or improvements shall have been completed. And Landlord shall have no responsibility or liability for failure to supply heat, elevator, plumbing and electric service, during said period or when prevented from so doing by strikes, accidents or by any cause beyond Landlord's control, or by laws, order or regulations of any Federal, State or Municipal Authority, or failure of coal, oil or other suitable fuel supply, or inability by exercise of reasonable diligence to obtain coal, oil or other suitable fuel. If the building of which the demised premises are a part supplies manually operated elevator service, Landlord may proceed with alterations necessary to substitute automatic control elevator service upon ten (10) day written notice to Tenant without in any way affecting the obligations of Tenant hereunder, provided that the same shall be done with the minimum amount of inconvenience to Tenant, and Landlord agrees with due diligence the correction of the allegations. **Continued in paragraph**

**Security** 25. Tenant has deposited with Landlord as security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this lease, it is agreed that in the event Tenant defaults in respect of any of the terms, provisions and conditions of this lease, including, but not limited to, the payment of rent and additional rent, Landlord may use, apply or retain the whole or any part of the security so deposited as the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default or for any sum which Landlord may expend or may be required to expend by reason of Tenant's default in respect of any of the terms, covenants and conditions of this lease, including but not limited to, any damages or deficiency in the re-letting of the premises, whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Landlord. In the event that Tenant shall fully and faithfully comply with all of the terms, provisions, covenants and conditions of this lease, the security shall be returned to Tenant after the date fixed as the end of the term and after delivery of entire possession of the demised premises to Landlord. In the event of a sale of the land and building of which the demised premises form a part, Landlord shall have the right to transfer the security to the vendee or lessee and Landlord shall thereupon be released by Tenant from all liability for the return of such security; and Tenant agrees to look to the new Landlord solely for the return of said security; and it is agreed that the provisions hereof shall apply to every transfer or assignment made of the security to a new Landlord. Tenant further covenants that it will not assign or sublease or attempt to assign or sublease the premises deposited herein as security and that neither Landlord nor its assignee or sublessee shall be bound by any such assignment or sublease. **Continued in paragraph**

**Captions** 26. The Captions are inserted only as a matter of convenience.

ADDITIONAL ARTICLES NOT PROVIDED IN STANDARD FORM OF LEASE OF OFFICE, BUT FORMING A PART HEREOF.  
AS SET OUT IN RILER LETTERS ATTACHED AND FORMING PART HEREOF  
CONSISTING OF SEVEN (7) PAGES.



As Witness whereof, Landlord and Tenant have signed the foregoing instrument and have caused the same to be signed and sealed by the City and County of New York.

MINICOLA OFFICE BUILDING INC.

Witness for Landlord:

BY

ATTEST



THE FRANKLIN NATIONAL BANK  
OF LONG ISLAND

BY

ATTEST



Witness for Tenant:

### ACKNOWLEDGMENTS

CORPORATE LANDLORD  
STATE OF NEW YORK  
County of New York

On this 9<sup>th</sup> day of December, 1933, before me

personally came  
to me known and known to me to be the individual described in and who, as  
LANDLORD, executed the foregoing instrument and acknowledged to me that  
he executed the same.

INDIVIDUAL LANDLORD  
STATE OF NEW YORK  
County of New York

On this day of Term Expires March 30, 1934, before me

personally came  
to me known and known to me to be the individual described in and who, as  
LANDLORD, executed the foregoing instrument and acknowledged to me that  
he executed the same.

CORPORATE TENANT  
STATE OF NEW YORK  
County of New York

On this 9<sup>th</sup> day of December, 1933, before me

personally came  
to me known, who being by me duly sworn, did depose and say that he called  
in No. 116-118 46<sup>th</sup> Street, Flushing, New York  
Vice-President  
NATIONAL BANK OF LONG ISLAND  
the corporation described in and which executed the foregoing instrument, as  
TENANT; that he knows the contents of said instrument; that he called and called  
said instrument in such corporate name and by such authority as he called and called  
the Board of Directors of said corporation, and that he signed the same there by  
his order.

INDIVIDUAL TENANT  
STATE OF NEW YORK  
County of New York

On this day of Term Expires March 30, 1934, before me

personally came  
to me known and known to me to be the individual described in and who, as  
TENANT, executed the foregoing instrument and acknowledged to me that  
he executed the same.

### GUARANTEE

FOR VALUE RECEIVED, and in consideration for, and as an inducement to  
Landlord, the within lease with Tenant, the undersigned guarantee to  
Landlord, Landlord's successors and assigns, the full performance and observance  
of all the covenants, conditions and agreements therein provided to be performed  
and observed by Tenant, including the "Rules and Regulations" as therein pro-  
vided, without requiring any notice of non-payment, non-performance, or non-  
observance, of bond, or notice, or demand, whereby to charge the undersigned  
therefor, all of which the undersigned hereby expressly covenants and expressly  
agrees that the validity of this agreement and the obligations of the guarantor  
hereunder shall in no wise be terminated, affected or impaired by reason of the

execution by Landlord against Tenant of any of the rights or remedies reserved to  
Landlord pursuant to the provisions of the within lease. The undersigned further  
covenants and agrees that this guarantee shall remain in full force  
and effect to its very natural termination or extension of this lease and, during  
any period when Tenant is occupying the premises as a Tenant, and during  
further extension to Landlord to make this lease and in consideration thereof,  
Landlord and the undersigned covenants and agrees that in any action or proceeding  
brought by either Landlord or the undersigned against the other on any matter  
concerning the within lease, or by virtue of the terms of this lease or of this  
guarantee that Landlord and the undersigned shall and do hereby waive and do hereby

Dated, New York City, 1933.  
WITNESSES:

Residence

Business Address

True Name

STATE OF NEW YORK  
County of New York

On this day of 1933, before me  
personally came  
to me known and known to me to be the individual described in, and who

executed the foregoing Guaranty and acknowledged to me that he executed  
the same.

Promises: Northside  
Old Country Road  
downtown Roslyn Road,  
Massau County, New York

Index

OFFICE BUILDING INC.  
TO  
1/23 FRANKLIN NATIONAL BANK  
6-18-1963

STANDARD FORM OF



Office  
Type

The Real Estate Board of New York, Inc.  
Copyright 1958. All Rights Reserved.  
Reprinted in whole or in part prohibited.

10d December 9th 1963  
ml per Year \$25,170.00

ml per Month \$2,097.50

mm  
mm

mm by \_\_\_\_\_ Checked by \_\_\_\_\_  
mm by \_\_\_\_\_ Approved by \_\_\_\_\_

## RULES AND REGULATIONS

1. The premises, together with the fixtures, furniture, and other contents, shall be used for the purposes only for which they are intended, and shall not be used for any other purpose without the written consent of the Landlord.

2. No person shall be permitted to occupy the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

3. No person shall be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

4. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

5. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

6. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

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8. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

9. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

10. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

11. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

12. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

13. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

14. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

15. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

16. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

17. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

18. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

19. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

20. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

21. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

22. The tenant shall not be permitted to use the premises for any purpose other than that for which they are intended, and no person shall be permitted to use the premises for any purpose other than that for which they are intended, without the written consent of the Landlord.

WOLFF & DIAMOND  
COUNSELORS AT LAW  
160-16 JAMAICA AVENUE  
JAMAICA 32, N. Y.  
REPUBLIC 8-4600

A 134

LOUIS DIAMOND  
DAVID H. WOLFF  
(1928-1998)  
JERRULE L. LUPOFF

August 5th, 1964

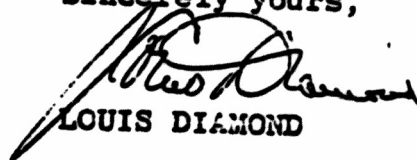
Andrew L. Magioncalda, Esq.  
Franklin National Bank  
925 Hempstead Turnpike  
Franklin Square, New York 11010

Re: Mineola Office Building Inc., Landlord  
with Franklin National Bank, Tenant -  
Lease 12/9/63

Dear Andy:

Enclosed herewith you will please find copy of Agreement dated July 27th, 1964 which has now also been signed by Mineola Office Building Inc., modifying the lease dated December 9, 1963.

Sincerely yours,

  
LOUIS DIAMOND

LD:BB  
Encl.



MEMORANDUM OF AGREEMENT made this 27<sup>th</sup> day of July, 1964 between MINEOLA OFFICE BUILDING INC., a New York corporation, with an office care of Lawrence Lever, 100 Merrick Road, Rockville Centre, New York, Party of the First Part, hereinafter referred to as "Landlord" and FRANKLIN NATIONAL BANK, a National Banking corporation with an office at No. 925 Hempstead Turnpike, Franklin Square, New York, Party of the Second Part, hereinafter referred to as "Tenant".

**W I T N E S S E T H :**

WHEREAS, heretofore by agreement of lease dated December 9th, 1963, the Landlord leased to Tenant and the Tenant hired from Landlord an area of four thousand one hundred ninety-five (4,195) square feet (measured from outside walls) in the southwest corner of the street-level floor in building to be erected by the Landlord on a portion of the plot approximately 200 feet wide by approximately 196 feet in depth, between Old Country Road and Third Street, which said plot is on the northerly side of Old Country Road distant approximately 149.43 feet west of Roslyn Road, at Mineola, Nassau County, New York (the demised premises being the westerly part of the lobby floor in dimensions of approximately 41 feet in width by approximately 102 feet in depth, outside measurements); and

WHEREAS, the parties hereto desire that the said lease be modified as hereinafter set forth;

NOW, THEREFORE, in consideration of the covenants hereinafter expressed, the parties hereto do hereby agree as follows:

**FIRST:** The said lease be and the same hereby is modified in the following respects:

of said lease be and the same hereby is modified to read as follows:

"(b) furnish heat to the demised premises when and as required by law, on business days from 8:00 A. M. to 6:00 P. M. and on Saturdays from 8:00 A. M. to 1:00 P. M. and also from 6:00 P. M. to 8:00 P. M. on Fridays other than on legal holidays;"

(b) Paragraph "37" of said lease be and the same hereby is modified by eliminating the word "separately" at the end of the first sentence thereof and by inserting in lieu thereof the words "and a heating system each as part of the central heating and air-conditioning systems of the entire building at the Landlord's own cost and expense; Landlord to furnish chilled water during cooling season and hot water during heating season but Tenant, at Tenant's own cost and expense to furnish electric current, <sup>for the air</sup> ~~including~~ handling equipment in the demised premises in respect to ~~but not limited to current for~~ air-conditioning system as provided in paragraph "44" hereof."

(c) In addition to the rentals provided for on the first page of the printed portion of said lease the Tenant agrees to pay to the Landlord the sum of Nine Hundred (\$900.00) Dollars which the Tenant agrees to pay in equal monthly installments of Seventy-five (\$75.00) Dollars in advance on the 1st day of each month during the original term hereof and during any renewal term and the amounts of Twenty-five Thousand One Hundred Seventy (\$25,170.00) Dollars and Two Thousand Ninety-seven and 50/100 (\$2,097.50) Dollars expressed on said page are hereby respectively correspondingly increased to the sums of Twenty-six Thousand Seventy (\$26,070.00) Dollars and Two Thousand One Hundred Seventy-two

and 50/100 (\$2,172.50) Dollars.

A137

(d) By adding at the end of sub-paragraph  
"(b)" of Article "30" the following:

"In the event such notice is sent by the Landlord there shall be added to the average square foot rental aforementioned the sum of Nine Hundred (\$900.00) Dollars per year payable in equal monthly installments of Twenty-five (\$75.00) Dollars each in advance on the 1st day of each month to cover Landlord's cost of supplying additional cooling or heat, as the case may be, in the hours of 6:00 P. M. to 8:00 P. M. on Fridays, exclusive of legal holidays, and in the event no such notice be given that then, and in such event, the basic annual rent shall be Twenty-six Thousand Seventy (\$26,070.00) Dollars which the Tenant agrees to pay in equal monthly installments of Two Thousand One Hundred Seventy-two and 50/100 (\$2,172.50) Dollars on the 1st day of each month during said extended term in addition to the items of additional rent as provided for during the original term."

SECOND: Except as provided in this Agreement, all of the terms, covenants and conditions contained in said lease bearing date December 9th, 1963 are hereby ratified and confirmed.

IN WITNESS WHEREOF, Landlord and Tenant have respectively signed and sealed this Agreement as of the day and year first above written.

MINEOLA OFFICE BUILDING INC.

BY 

ATTEST

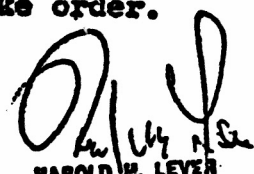
FRANKLIN NATIONAL BANK

BY 

Vice-President

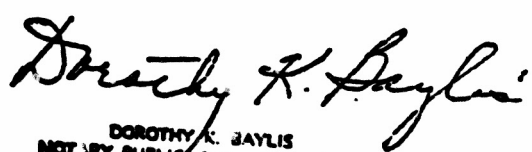
STATE OF NEW YORK )  
COUNTY OF NASSAU ) SS.:

On this 3<sup>rd</sup> day of August, 1964, before me personally came LAWRENCE LEVER, to me known, who being by me duly sworn, did depose and say that he resides at No. 19 Atkinson Road, Rockville Centre, New York; that he is the President of NINEOLA OFFICE BUILDING INC., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

  
HAROLD M. LEVER  
Notary Public, State of New York  
No. 30-7506325  
Qualified in Nassau County  
Commission Expires March 30, 1965

STATE OF NEW YORK )  
COUNTY OF Nassau ) SS.:

On this 27<sup>th</sup> day of July, 1964, before me personally came JOHN SIDLICK, to me known, who being by me duly sworn, did depose and say that he resides at No. 196-15 45th Road, Flushing, New York; that he is the Vice-President of FRANKLIN NATIONAL BANK the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

  
DOROTHY K. BAYLIS  
NOTARY PUBLIC, State of New York  
No. 30-5113700  
Qualified in Nassau County  
Term Expires March 31, 1965

Defendant Jean M. Grella Cross Motion to Dismiss Complaint,  
Or, In the Alternative, to Deny Plaintiff's Request For Pre-  
liminary Injunction

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 139

-----X  
FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank,

Plaintiff,

: (O.G.J.)  
: 75 C. 276

- against -

JEAN M. GRELLA, LAWRENCE LEVER, and  
RELIANCE FEDERAL SAVINGS AND LOAN  
ASSOCIATION OF NEW YORK,

: NOTICE OF  
: CROSS MOTION

Defendants.

-----X

TAKE NOTICE, that on the complaint herein, the order to show cause dated February 21, 1975, the plaintiff's moving papers and exhibits, and the annexed affidavits of Jean M. Grella and James J. Milligan, the undersigned will move this Court in Courtroom 11, United States Court House, 225 Cadman Plaza East, Brooklyn, New York on March 4, 1975 at 2 o'clock P.M. or as soon thereafter as counsel can be heard:

A. For an order dismissing the complaint and the action on the ground that the complaint states no claim for which relief can be granted, in that:



1. As to the ground-lease

A 140

- (a) The insolvent estate had no interest in the ground lease at the time of the declaration of insolvency, and had none for more than ten years prior to the declaration.
- (b) The court has no power to make a declaration of the rights of the parties under a contract in which the insolvent estate had no interest.
- (c) The defendant Grella has made no claim under the ground lease against the insolvent estate, and therefore there is no present existing controversy with relation thereto.
- (d) There is no justiciable controversy before the court with relation thereto.
- (e) There is no amount involved, let alone \$10,000.
- (f) The claim presents for determination no substantial Federal question.

2. As to the sub-lease of the branch office to Franklin.

- 
- (a) There is no privity of estate or contract between the insolvent estate and the defendant Grella.
  - (b) The court has no power to make a declaration of the rights of the parties under a contract in which the defendant Grella has no interest, which would be binding on Grella.
  - (c) The defendant Grella has made no claim against the insolvent estate with relation to the branch lease, and has offered in any event to agree not to disturb the possession of the insolvent estate or its licensee or assignee thereunder, and therefore there is no present existing controversy with relation thereto.

(d) There is no justiciable controversy before the court with relation thereto.

(e) There is no amount involved, let alone \$10,000.

(f) The claim presents for determination no substantial Federal question.

B. Granting defendant such other relief as may be just and proper.

C. Dispensing with the usual cross-notice time requirement.  
D. Denying plaintiff's application in its entirety.

Dated: Mineola, New York  
March 3, 1975

Yours, etc.

SPRAGUE, DWYER, ASPLAND & TOBIN, P.C.  
Attorneys for Defendant, Jean M. Grella  
Office & P.O. Address  
200 Old Country Road  
Mineola, New York 11501

TO: HUGHES HUBBARD & REED  
Attorneys for Plaintiff Federal  
Deposit Insurance Corporation

WOLF & DIAMOND  
Attorneys for Defendant Lawrence Lever

RICHARD S. WOLFELD  
Attorney for Defendant Reliance  
Federal Savings and Loan  
Association of New York

Affidavit of Jean M. Grella In Support of Defendant's  
Cross Motion to Dismiss Complaint, Or, in the Alterna-  
tive, to Deny Plaintiff's Request For Preliminary In-  
Junction

Same as Exhibit E Annexed to Affidavit of Susan L.  
Thorner

Printed at Page 40-1

X

Affidavit of James J. Milligan In Support of Defendant's  
Cross Motion To Dismiss Complaint, Or, in the Alternative,  
to Deny Plaintiff's Request For Preliminary Injunction

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

A 142

-----x  
FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank,

Plaintiff,

- against -

JEAN M. GRELLA, LAWRENCE LEVER, and  
RELIANCE FEDERAL SAVINGS AND LOAN  
ASSOCIATION OF NEW YORK,

Defendants.

:  
:  
: (O.G.J.)  
: 75 C. 276  
:  
: AFFIDAVIT IN  
: SUPPORT OF  
: MOTION

-----x  
STATE OF NEW YORK )  
: ss.  
COUNTY OF NASSAU )

JAMES J. MILLIGAN, being duly sworn, deposes  
and says:

1. I am a member of the firm of SPRAGUE, DWYER,  
ASPLAND & TOBIN, P.C., the attorneys for the defendant, JEAN  
M. GRELLA, in this action and make this affidavit in support of  
the motion to dismiss the complaint, or alternatively, deny  
plaintiff's application for a stay pendente lite.

2. As related in the affidavit of Mrs. Grella  
in support of this motion, our firm has been involved in

representing Mrs. Grella with respect to this property since 1961 when we were first retained to review a lease prepared by Andrew L. Magioncalda, Esq., the attorney for Franklin National Bank. I am familiar with that lease as I reviewed the draft submitted by the Franklin National Bank and participated on behalf of Mrs. Grella in negotiations with the bank prior to its execution in which I endeavored to obtain a more comprehensive document and more favorable terms for our client. Regrettably, due to the fact that Mrs. Grella had committed herself by executing a detailed binder, we were not able to achieve as much for our client as we would have liked. Interestingly, a review of our old file on the lease indicates that shortly after execution of the lease the Franklin National Bank, apparently acting at the request of Mr. Lever, began making requests to modify the existing lease. In essence, the nature of the requests was that Franklin realized that Mrs. Grella was not required to subordinate her fee to any leasehold mortgage and furthermore, the lease was not what would be considered a mortgageable lease in that a mortgagee, under the terms of the lease, would not have a right to cure any default made by the tenant. Mrs. Grella did not at any time agree to any modifications of the lease and had always looked upon Franklin National Bank as her tenant.



3. I have located in our file and annex hereto as "Exhibit A" a copy of a letter from the Franklin National Bank to Mrs. Grella's son, wherein Mr. Magioncalda states "I wish you would discuss with your mother the possibility of getting her consent simply to a statement that if the tenant (meaning the Franklin National Bank)". Nothing more clearly supports Mrs. Grella's position and contradicts that of the Federal Deposit Insurance Corporation than the letter of the bank's own attorney.

4. As stated in Mrs. Grella's affidavit, any jeopardy to the European American sub-lease or to the public interest in favor of a smooth transition of banking at the time of a bank failure is not real but is imagined by the plaintiff. As set forth in the Memorandum of Law submitted in support of this motion, it would appear that the plaintiff does not have standing to sue, the Court lacks jurisdiction of the matter, there is no case or controversy and that the defendant's motion should be granted in all respects.

5. It is submitted that whatever tenuous claims to standing the plaintiff has made based upon the tenancy of the branch bank by European American & Trust Company have been effectively nullified by Mrs. Grella's affidavit, which offers it a non-disturbance agreement.

WHEREFORE, deponent respectfully prays for an order dismissing the complaint or alternatively, denying the plaintiff's motion.

James J. Milligan  
JAMES J. MILLIGAN

Sworn to before me this  
3rd day of March, 1975.

Rose Gilbert

ROSE GILBERT  
NOTARY PUBLIC, State of New York  
No. 30-4505356  
Qualified in Nassau County  
Commission Expires March 30, 1977

Exhibit A Annexed to Affidavit of James J. Milligan dated  
March 3, 1975 (Letter, dated August 7, 1962, Andrew L.  
Magioncalda to Michael Grella)

## [LETTERHEAD OF THE FRANKLIN NATIONAL BANK]

August 7, 1962

Mr. Michael Grella  
County Restaurant Bar & Equipment Co.  
290 Jericho Turnpike  
Mineola, New York

re: Old Country Road property

My dear Mr. Grella,

As I explained to you over the telephone today, I wish you would discuss with your mother the possibility of getting her consent simply to a statement that if the tenant (meaning the Franklin National Bank) should at any time default in any of the terms of the lease, that before she dispossesses she agrees that she will give notice of such default to the holder of our mortgage. This will give her, of course, the added assurance that even if Franklin fails to pay the rent the mortgagee might pay the rent.

As far as the Bank is concerned, this becomes very important since we would like to assign or sublet the property to a corporation that would put up a substantial building, mortgaging the lease-hold but, of course, the lease-hold is worthless if the tenant should fail to pay the rent and the mortgagee knowing nothing about it might find himself without security. Giving him an opportunity to cure the default simply protects him.

Without a mortgage, of course, any builder will be limited in the size and importance of the building he can erect. With a mortgage we should hope to put up a more substantial building.

Very truly yours,

s/Andrew L. Magioncalda,  
Counsel.

Order of Judd, J. Denying Defendant's Cross Motion to Dis-  
miss Complaint, Or, In the Alternative, to Deny Plaintiff's  
Request For Preliminary Injunction

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank,

Plaintiff,

-against-

JEAN M. GRELLA, LAWRENCE LEVER and  
RELIANCE FEDERAL SAVINGS AND LOAN  
ASSOCIATION OF NEW YORK,

Defendants.

(O.G.J.)  
75 C. 276

ORDER

The motion of defendant Jean M. Grella to dismiss the complaint and, in the alternative, to deny plaintiff's motion for a preliminary injunction having come on to be heard on the 4th day of March, 1975 and the Court having permitted said motion to come on without notice, and the Court having considered said motion, the sworn affidavits of Jean M. Grella and James J. Milligan in support thereof, and defendant Grella's memorandum of law in support thereof, and the Court having heard oral argument by Grella's attorney in support of said motion, and the Court having denied Grella's motion from the bench, it is hereby

ORDERED, that defendant Grella's motion to dismiss the complaint and, in the alternative, to deny plaintiff's motion for a preliminary injunction be, and the same hereby is denied, and that defendant Grella be given leave to answer within ten days after service of a copy of this order, with notice of entry, on Grella's attorneys.

✓ Dated: Brooklyn, New York  
April 2, 1975

SO ORDERED:

✓  
  
United States District Judge



Plaintiff's Exhibit 19 Introduced At Hearing On Application  
For Preliminary Injunction.

(Purchase And Assumption Agreement Dated October 8, 1974)

(pages 1 to 56)

[CONFORMED]

---

**Purchase and Assumption  
Agreement**

---

**Dated: October 8, 1974**

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**PURCHASE AND ASSUMPTION AGREEMENT****TABLE OF CONTENTS\***

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**THIS PURCHASE AND ASSUMPTION AGREEMENT**, made and entered into as of 3:00 p.m. (Eastern Daylight Time) the 8th day of October, 1974 by and between the Federal Deposit Insurance Corporation (the "Corporation") as receiver of the Franklin National Bank (the "Bank"), the Bank acting through said receiver (together, the "Receiver") and European-American Bank & Trust Company a New York trust company (the "Assuming Bank").

**WITNESSETH:**

**WHEREAS**, the Bank has been closed by the Comptroller of the Currency as of 3:00 p.m. (Eastern Daylight Time) on October 8, 1974 (the "Bank Closing");

**WHEREAS**, the Comptroller of the Currency, in accordance with 12 U.S.C. §191 and 12 U.S.C. §1821(c), has appointed the Corporation to be the Receiver;

**WHEREAS**, by operation of law the Receiver has succeeded to the exclusive dominion and control over all of the assets of the Bank and is the sole authorized agent in law of the Bank;

**WHEREAS**, it is in the best interests of the public, the depositors and other creditors of the Bank, and necessary to meet the convenience and needs of the communities served by the Bank, that certain of the assets and liabilities of the Bank be transferred to and assumed by another bank as soon as possible;

**WHEREAS**, to that end the Assuming Bank has indicated its willingness to acquire assets and assume liabilities as hereinafter provided;

**WHEREAS**, the Bank is indebted to the Federal Reserve Bank of New York (the "FRB") approximately in the principal amount of \$1,723,000,000 (together with accrued and unpaid interest thereon and the obligations of the Bank under the Contract for Sale of Foreign Exchange Contracts and Foreign Currency Balances between it and the FRB dated as of September 26, 1974, the "FRB Indebtedness"), and to secure the FRB Indebtedness the Bank has granted a security interest in a substantial portion of its assets to the FRB (the "FRB Security Interest");

**WHEREAS**, the Assuming Bank desires to acquire the assets of the Bank which it acquires hereunder unencumbered by the FRB Security Interest;

**WHEREAS**, the Corporation, pursuant to 12 U.S.C. § 1823(e), in order to facilitate the consummation of the transactions contemplated hereby, is entering into agreements with the FRB and the Receiver pursuant to which the Corporation, among other things, assumes the FRB Indebtedness in consideration of the transfer by the Receiver to the Corporation of the assets of the Bank not acquired by the Assuming Bank; and

**WHEREAS**, the FRB, in consideration of the Corporation's assumption of the FRB Indebtedness, is releasing the FRB Security Interest in the assets being acquired by the Assuming Bank, effective as provided in subsection 3.1 hereof.

Now, **THEREFORE**, in consideration of the premises and of the mutual agreements hereinafter set forth, it is hereby agreed as follows:

#### **SECTION 1. PURCHASE AND SALE OF BANK ASSETS.**

##### **1.1 Purchase and Sale.**

Subject to and in accordance with the terms of this Agreement, the Assuming Bank hereby purchases and acquires, and the Receiver hereby grants, sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest of the Bank and the Receiver in and to certain assets of the Bank and the Receiver having a value determined as provided in this Agreement which is equal to (i) the Book Value of the deposits and other liabilities of the Bank assumed by the Assuming Bank under subsection 2.1 hereof plus (ii) the amount of the payments under letters of credit to be reimbursed pursuant to subsection 2.3 hereof by the selection of assets plus (iii) the amount of advances on loans for the account of the Receiver to be reimbursed pursuant to subsection 3.6(g) hereof by the selection of assets, less (iv) the premium set forth in Section 19 hereof. The terms and provisions of such purchase, acquisition, grant, sale, assignment, transfer, conveyance and delivery are more fully set forth below.

### **1.2 Schedules of Liabilities and Assets.**

Annexed hereto are Schedules A, B, C, D, E, F, G and H. Such Schedules set forth, on the basis of the best information now available to the Receiver, a list of all of the accounts maintained by the Bank and, for convenience only, a cross-reference from Schedule A to Schedules B, C and D and to the Exhibits thereto, if any, on which each such account appears (Schedule A), the liabilities which would be assumed under subsection 2.1 hereof (Schedule B), the assets which would be purchased under subsection 3.2 hereof (Schedules C and F), the assets which would be available for selection under subsection 3.3 hereof (in which an undivided interest would be purchased pursuant to such subsection) and the assets which would be available for purchase under Section 4 hereof (Schedule D), certain assets which would be excluded from purchase and retained by the Receiver (Schedule E), the amount of letter of credit liabilities which would be assumed under subsection 2.3 hereof (Schedule G) and the domestic branches and banking offices of the Bank (Schedule H) if the Bank Closing were as of the date set forth on such Schedules. Such Schedules shall be used and adjusted as provided in subsection 2.3 and Section 20 hereof.

### **1.3 Book Value.**

The term "Book Value", when used with respect to liabilities or assets of the Bank in this Agreement, shall mean the amount stated on the books and records of the Bank as of the Bank Closing, after adjustment for depreciation where appropriate, suspense items, unposted debits and credits and after other adjustments called for by the provisions of this Agreement, including without limitation Section 20 hereof. The "Book Value" of any asset or liability which is, or is payable in, or carried on the books and records of the Bank at values denominated in, any currency other than that of the United States shall be an amount expressed in United States dollars determined at the bid, in the case of assets, or asked, in the case of liabilities, exchange rate for spot transactions in such currency quoted in the New York interbank market by The Chase Manhattan Bank, N.A. (the "Foreign Currency Appraiser") as of 9 a.m. (Eastern Daylight Time) on the first banking business day after the Bank Closing. If the Foreign Currency Appraiser did not quote any such currency as of such time, such amounts shall be determined at the fair market bid or asked, respec-

tively, exchange rate for spot transactions as of such time as determined by the Foreign Currency Appraiser in its sole discretion. The Receiver shall notify the Assuming Bank of the rates so quoted or determined as promptly as possible following the Bank Closing. Notwithstanding the foregoing, the Book Value of any asset or liability payable in any currency other than that in which it is carried on the books of the Bank shall be determined pursuant to this subsection as if it were at all times carried on the books of the Bank in the currency in which it is payable.

## **SECTION 2. . ASSUMPTION OF LIABILITIES.**

### **2.1 *Specific Assumption.***

Subject to and in accordance with the terms of this Agreement, the Assuming Bank expressly assumes and undertakes to pay, perform, fulfill and discharge the following liabilities of the Bank (as and to the extent shown on the books of the Bank as of the Bank Closing as adjusted as provided for in this Agreement, including without limitation Section 20 hereof) and none other, without duplication, at Book Value:

(a) All demand deposits, including without limitation: amounts due to foreign and other domestic banks; cashier's checks, certified checks, money orders and other official checks; trust deposits; and employee withheld payroll deductions; including any accrued and unpaid interest on such deposits.

(b) All time and savings deposits, including any accrued and unpaid interest thereon.

(c) All liabilities for: federal funds purchased (except the FRB Indebtedness); overdrafts on accounts maintained by the Bank with foreign and other domestic banks; securities sold under agreements to repurchase; short sales of securities; and borrowed securities; including any accrued and unpaid interest on the foregoing.

(d) All liabilities on acceptances.

(e) All accrued real estate, sales and use, social security and unemployment taxes, taxes withheld or collected from customers and all accounts payable and accrued operating expenses, includ-

ing, but not limited to, salary (exclusive of amounts incurred under any deferred executive compensation plan, contract or arrangement of the Bank), telephone, advertising and public relations expenses incurred by the Bank through the Bank Closing, but excluding all basic rent incurred by the Bank with respect to any parcel of real estate owned by FBI (as hereinafter defined) or improvement thereon.

(f) All liabilities for unissued food stamps and unremitted proceeds from the sale of food stamps.

(g) All liabilities for overpayments on personal installment, check credit and other consumer loans and credit card receivables acquired pursuant to subsection 3.2(b) hereof.

(h) All liabilities for tenants' security deposits.

## **2.2 Deposits.**

As used in this Agreement, the term "deposits" shall include, but not be limited to, all uncollected items included in depositors' balances and credited on the books of the Bank subject to final payment.

## **2.3 Letters of Credit.**

### **(a) Assumption of Certain Letter of Credit Obligations.**

Within one day of the Bank Closing the Receiver shall deliver to the Assuming Bank a list of all letters of credit issued or confirmed by the Bank outstanding as of the Bank Closing (other than "standby letters of credit" as defined in § 7.1160(a) of the Interpretive Rulings of the Comptroller of the Currency, herein the "Ruling"). Subject to the adjustments called for by, and the other terms of, this Agreement, the Assuming Bank expressly assumes and undertakes to pay, perform, fulfill and discharge the liabilities of the Bank under all letters of credit set forth on such list. The Receiver hereby grants, sells, assigns, transfers, conveys and delivers to the Assuming Bank the entire interest of the Bank and the Receiver in and to the obligations of the account parties on the letters of credit hereby assumed and in and to any collateral securing such obligations. The term "collateral" as used herein shall be deemed to include, without limitation, the obligations of third parties, including guarantors, indemnitors, and other parties

in respect of such letters of credit. In the event of payment by the Assuming Bank to the beneficiary under any such letter of credit prior to the earlier of (i) 170 days after the Bank Closing or (ii) 10 days before the reduction of the Additional Asset Value (as hereinafter defined) to zero, the Assuming Bank may at its option and within the earliest of 30 days after such payment, 180 days after the Bank Closing, or the date on which the Additional Asset Value is reduced to zero reassign (without recourse or warranty) to the Receiver the relevant account party obligation and any collateral securing same, whereupon the Assuming Bank shall, within 30 days following such reassignment but not later than 180 days after the Bank Closing or the earlier reduction of the Additional Asset Value to zero, select or purchase Available Assets (as hereinafter defined) with a value or purchase price equal to the amount of such payment less any recovery realized on the account party obligation prior to its reassignment to the Receiver, without any reduction as a result of such selection or purchase in the Additional Asset Value. In the event of payment by the Assuming Bank to the beneficiary under any such letter of credit after the earlier of (i) 169 days after the Bank Closing or (ii) 11 days before the Additional Asset Value is reduced to zero, the Assuming Bank shall use its best efforts (but not including any obligation to institute any legal action) to reimburse itself for such payment from the relevant account party or out of any collateral securing such account party's obligation. To the extent not made whole for such payment within 30 days after such payment, the Assuming Bank may thereupon reassign (without recourse or warranty) to the Receiver the remaining account party obligation and collateral, if any, securing same whereupon the Receiver shall pay in cash to the Assuming Bank the amount of such payment less any reimbursement received from the account party or out of collateral by the Assuming Bank. For purposes of this subsection 2.3, and subsection 3.3 hereof, the words "payment to the beneficiary" mean payment in cash, acceptance of a draft or any other method by which the Assuming Bank's obligation is discharged or evidenced by an instrument separate from the relevant letter of credit. If any recovery by the Assuming Bank is rescinded or otherwise restored upon the bankruptcy or insolvency of the account party or any party granting the collateral or otherwise, the Receiver shall forthwith pay to the Assuming Bank, in cash, the amount of such recovery which is rescinded or which must be so restored against assignment to the Receiver of the



relevant obligation or claim, if any. The amount of any payment in any currency other than that of the United States shall, for the purposes of this subsection 2.3, be an amount expressed in United States dollars determined at the asked exchange rate for spot transactions quoted in the New York interbank market by the Foreign Currency Appraiser on the date of such payment or, in the absence of such a quote, at the fair market asked exchange rate for spot transactions as of such date as agreed upon by the parties.

(b) *Letter of Credit Fees.*

Fees, whether paid prior to or after the Bank Closing for the issuance or confirmation of letters of credit assumed by the Assuming Bank, shall be one half for the account of the Receiver and one half for the account of the Assuming Bank, but the Assuming Bank's portion thereof shall be refunded pro rata to the Receiver in respect of any reassignment of an account party obligation or any portion thereof hereunder at the time of such reassignment. Adjustments for such fees shall be made on the first business day of each month, and the net amount due to the Receiver or to the Assuming Bank shall be paid in cash.

(c) *Adjustments to Schedule G.*

Notwithstanding any other provision of this Agreement, for a period of two years following the Bank Closing, Schedule G (and the list of letter of credit liabilities to be assumed referred to in this subsection 2.3) may be adjusted from time to time to add additional liabilities for letters of credit issued or confirmed by the Bank prior to the Bank Closing which are not standby letters of credit as that term is defined in the Buling but not to delete therefrom, without the consent of the Assuming Bank, any letter of credit originally listed or included.

2.4 *Certain Tax Liabilities.*

The Assuming Bank expressly assumes and undertakes to pay, fulfill and discharge the liabilities of the Bank (whether or not shown on the books of the Bank) for taxes imposed by the United Kingdom or any municipality thereof resulting from operation of the Bank's London branch.



### **2.5 Interest.**

All liabilities assumed under this Agreement by the Assuming Bank are assumed as of the Bank Closing, and the Assuming Bank agrees, subject to the provisions of subsection 2.6 hereof, to pay interest on the obligations assumed by the Assuming Bank in accordance with the terms of such obligations, as such terms are reflected on the records of the Bank at the Bank Closing.

### **2.6 Payment of Taxes and Expenses.**

With respect to employee withheld payroll deductions and accrued real estate, sales and use, social security and unemployment taxes, taxes withheld or collected from customers, other tax liabilities and liabilities assumed by the Assuming Bank which relate to the Bank's fringe benefit plans, the Assuming Bank's responsibility is limited to payment, at the instruction of the Receiver, of the amounts of the liabilities assumed without any obligation to file any returns or make any reports or determine the correct amount of, or to assume liability for interest on, such payroll deductions, taxes and liabilities. With respect to accounts payable and accrued operating expenses, the Assuming Bank's responsibility is limited to payment, at the instruction of the Receiver, of the amount of any claim which is determined by the Receiver to be properly attributable to the period prior to the Bank Closing.

## **SECTION 3. DETAILED DESCRIPTION OF PURCHASE AND SALE AND DETERMINATION AND VALUATION OF ASSETS.**

### **3.1 Freedom from Certain Liens.**

The assets acquired by the Assuming Bank are being transferred free and clear of the FRB Security Interest which shall terminate and be of no further force and effect without further act or deed (i) immediately, in the case of assets referred to in subsection 3.2 hereof, (ii) effective upon selection, in the case of assets selected as provided in subsections 2.3, 3.3, 3.6 and 20.2 hereof and (iii) effective upon purchase or other transfer in the case of assets purchased or otherwise transferred as provided in Section 4 hereof.

### **3.2 Conveyance of Entire Interest in Certain Assets.**

The Assuming Bank hereby purchases from the Receiver, and the Receiver hereby grants, sells, assigns, transfers, conveys and delivers

to the Assuming Bank, the entire interest of the Bank and the Receiver in and to the assets described in this subsection 3.2. Such assets are being purchased as of the Bank Closing at their Book Value unless otherwise specified below, subject to the adjustments set forth in this Agreement. All assets so purchased shall continue to accrue for the account of the Assuming Bank in accordance with the terms of the related obligation and shall be valued less any set-offs asserted by the obligor (direct or contingent) in respect of any such asset for liabilities of the Bank not assumed pursuant to Section 2 hereof.

(a) *Cash and Receivables from Banks.*

(i) United States currency and coin.

(ii) Foreign currency and coin.

(iii) Receivables (including certificates of deposit) properly classified in Schedule D of Reports of Condition of National Banking Associations under the captions "Demand Balances with Banks in the United States" and "Other Balances with Banks in the United States (including all balances with American branches of foreign banks)" which are due from other domestic banks and domestic branches (but not domestic agencies or representative offices) of foreign banks, receivables due from foreign branches of other American banks, federal funds sold, reserve accounts held by the FRB and cash items in process of collection (subject to return adjustments).

(iv) Food stamps.

(v) Advanced dividends—personal trust.

(b) *Consumer Installment Loans.*

Personal installment, check credit and other consumer loans (excluding dealer wholesale loans, dealer originated paper, receivables acquired by the Bank under its arrangements with Military Purchase Systems, Inc. and Small Business Administration loans) and credit card receivables and loans, including charged-off loans and receivables of such types, at Book Value (which shall be zero for such charged-off loans and receivables and any other loans and receivables of such types which should have been charged-off at or prior to the Bank Closing under the Bank's normal charge-off procedures) plus accrued interest

or adjusted for unearned discount (whichever is applicable and whether or not booked) and less unearned premiums on credit life insurance.

**(c) *Other "Cash" and "Near-Cash" Items.***

All other receivables of the Bank properly classified in Schedule D of Reports of Condition of National Banking Associations under the caption "Balances with Banks in Foreign Countries (including balances with foreign branches of other American banks)" which are due from foreign banks, including demand and time deposits, placements and other similar assets, and receivables due from domestic agencies or representative offices of foreign banks, unless any of the foregoing are excluded in whole or in part by written statement to such effect (whereupon a conforming adjustment shall be made to Schedule C) delivered by the Assuming Bank to the Receiver within two banking business days after the Receiver delivers to the Assuming Bank a list of all such receivables reflecting the amounts by currency, interest rates and maturities thereof and the names of the foreign banks. Any such assets so excluded shall remain the property of the Receiver.

**(d) *Pre-selected Assets.***

All assets listed by the Assuming Bank on Schedule F. Initially, and until the value of such assets is determined, such assets shall be valued at Book Value. Thereafter, the values of such assets shall be adjusted to values determined in the same manner as the value of similar assets is determined pursuant to subsection 3.3 or Section 4 hereof.

**(e) *Accrued Assets and Prepaid Expenses.***

All accrued assets and prepaid expenses relating to an asset purchased under this subsection 3.2 or a liability assumed under Section 2 hereof, other than (i) expense advances to employees retained by the Assuming Bank for less than 5 days following the Bank Closing and (ii) such assets and expenses otherwise acquired hereunder.

**(f) *Borrowed Securities.***

All borrowed securities for which the Assuming Bank has assumed the corresponding liability under subsection 2.1(c) hereof.

### 3.3 *Conveyance of Undivided Interest in Certain Assets.*

The Assuming Bank hereby purchases from the Receiver, and the Receiver hereby grants, sells, assigns, transfers, conveys and delivers to the Assuming Bank, an undivided interest in and to all assets of the Bank and the Receiver, which are described in this subsection and which are, at the time, available for purchase or selection (the "Additional Assets"). The Assuming Bank's undivided interest in the Additional Assets from time to time shall be an amount (the "Additional Asset Value") equal to the Book Value of the liabilities assumed by the Assuming Bank under subsection 2.1 hereof less the sum of (i) the premium provided for in Section 19 hereof, (ii) the value, as established under this Agreement, of the assets purchased by the Assuming Bank under subsection 3.2 hereof, (iii) the value, as established under this Agreement, of the Additional Assets theretofore selected under this subsection 3.3 and (iv) the purchase price, as established under this Agreement, of the assets theretofore purchased by the Assuming Bank under Section 4 hereof. During the period of 180 days following the Bank Closing, the Assuming Bank shall select Additional Assets as described in this subsection 3.3 and shall purchase assets described in Section 4 hereof, in each case by notice to the Receiver, which have an aggregate value and purchase price as established under this Agreement equal to the Additional Asset Value as of the Bank Closing (adjusted in accordance with the provisions of this Agreement, including without limitation Section 20 hereof) plus the amount of any payments to beneficiaries under letters of credit or advances by virtue of which the Assuming Bank is entitled to select Available Assets (as defined below) under subsection 2.3 or 3.6(g) hereof. Such selections and purchases shall be made within the times, at the valuations and subject to the adjustments provided for in this Agreement. Upon the selection or purchase of Additional Assets, the entire right, title and interest in and to such Additional Assets shall belong to and vest in the Assuming Bank as of the Bank Closing, without further act or deed. The Assuming Bank shall also be obligated to designate, as provided in subsection 3.4 hereof, those Additional Assets and assets described in Section 4 hereof as available for purchase which it determines not to select or purchase; and, in the case of Additional Assets, upon such designation the undivided interest of the Assuming Bank granted in such Additional Assets pursuant to this subsection 3.3 shall terminate

and the entire right, title and interest in and to such assets shall belong to and vest in the Receiver as of the Bank Closing without further act or deed. The assets so selected, purchased or designated shall thereupon no longer be a part of the Additional Assets. All Additional Assets shall continue to accrue in accordance with the terms of the related obligation and all such accruals shall be for the account of the Assuming Bank if the asset is selected or purchased, and for the account of the Receiver if the asset is so designated.

As used in this Agreement, the term "Available Assets" shall mean the Additional Assets and the assets available at the time for purchase pursuant to Section 4 hereof.

(a) *Securities.*

(i) The Assuming Bank may select, in the manner provided for in this subsection 3.3(a), securities owned by the Bank as of the Bank Closing (except stock of the FRB, stock of FNB Bradford Stock Services, Inc., stock of the Bank's subsidiaries and warrants, options or similar rights received or bargained for by the Bank at the time of the initial making of a loan by the Bank) including, but not limited to, securities issued by the United States Treasury, by United States Government agencies or corporations, by a state or political subdivision or by a private corporation or other business entity. Such securities may be selected or rejected before or after valuation but in each case shall be valued at their fair market value as determined below, plus accrued but unpaid interest as of the Bank Closing. Such interest computation will be made by the Assuming Bank and the Receiver. Securities not selected or rejected prior to valuation may be selected within two banking business days after the date their fair market value, as determined pursuant to subsection 3.3(a)(ii) hereof, has been furnished by the Securities Appraisers (as hereinafter defined) to the Assuming Bank. Securities appraised and not selected within such period shall be deemed automatically rejected by the Assuming Bank. Securities so selected which were pledged by the Bank as security for public deposits, pledged as security for a bond issued to secure public deposits, pledged for faithful performance of the trust department of the Bank or sold by the Bank subject to repurchase agreements may, but need not, be selected and, if selected, shall be selected subject to any such pledge or security interest. Any other securities so selected but

not delivered to the Assuming Bank within three banking business days after selection may be rejected by the Assuming Bank at any time prior to delivery. Within three banking business days after any securities are rejected or deemed rejected by the Assuming Bank, the Assuming Bank shall take whatever steps are necessary to obtain the release of any security interests which exist in the rejected securities and which secure liabilities assumed by the Assuming Bank and shall provide the Receiver with such documents or other evidence of that release as it shall reasonably request.

(ii) From time to time and as promptly as practicable (but in any event within 150 days) after the Bank Closing, the fair market value as of the Bank Closing (or later date referred to below) of all securities available for selection hereunder and not previously rejected by the Assuming Bank shall be determined by Salomon Brothers and Merrill Lynch, Pierce, Fenner & Smith Incorporated (the "Securities Appraisers") in the manner referred to in Annex 1. hereto. The Securities Appraisers shall furnish such determinations of fair market value in writing to the Assuming Bank and the Receiver immediately upon the making of such determinations. In the event that the determination of fair market value is not made with respect to any security owned by the Bank as of the Bank Closing within fifteen days of the Bank Closing, the Receiver or the Assuming Bank may request, prior to selection, a new determination of the fair market value of such security as of two banking business days following such request, and such security shall be valued and may be selected by the Assuming Bank at the higher of the two valuations.

**(b) Loans.**

(i) The Assuming Bank may select loans made by the Bank including customers' liabilities on acceptances and overdrafts. The loans so selected shall be valued at their Book Value plus accrued but unpaid interest or less unearned discount, whichever is applicable, as of the Bank Closing. Any loans purchased by the Assuming Bank pursuant to subsection 3.2(b) hereof or selected pursuant to this subsection 3.3(b) which are subject to the interest of Bank of America National Trust and Savings Association under



its participation agreement with the Bank shall be purchased or selected subject to such interest, and the Assuming Bank shall not fail to select any such loan if such failure would result in a liability to the Receiver pursuant to such participation agreement.

(ii) The Assuming Bank agrees to select receivables arising from advances made with respect to selected mortgage loans such as real estate tax, insurance and other advances, at the Book Value thereof.

(iii) Warrants, options or similar rights received or bargained for by the Bank at the time of the initial making of a loan by the Bank shall be acquired by the Assuming Bank without any reduction in the Additional Asset Value if the loan is selected. Such warrants, options or similar rights shall become the sole property of the Receiver if the loan is rejected.

(iv) Any overdraft on which full payment is made within 30 days of the Bank Closing shall be automatically selected by the Assuming Bank. Any other overdraft may be selected or rejected, except that the Assuming Bank may only reject that part of any overdraft that it cannot satisfy by exercising any rights of set-off available to it and shall thereafter remit to the Receiver any collections on the overdraft received by it.

(v) Any foreign exchange contracts entered into by the Bank to specifically cover the exchange risk on a foreign currency loan shall be acquired by the Assuming Bank without any reduction in the Additional Asset Value if that foreign currency loan is selected. Such contracts shall become the sole property of the Receiver if that foreign currency loan is rejected.

*(c) Accrued Assets and Prepaid Expenses.*

The Assuming Bank shall purchase all accrued assets and prepaid expenses relating to an asset selected under this subsection 3.3 at Book Value other than expense advances to employees retained by the Assuming Bank for less than five days following the Bank Closing.

**3.4 Procedure for Additional Asset Selection.**

(a) On or before each of the dates specified below, the Assuming Bank shall have purchased pursuant to subsection 3.2(d) or 3.3 or pursuant to Section 4 hereof, by notice to the Receiver or by inclusion



in Schedule F, assets having an aggregate value and purchase price, determined as provided in this Agreement, equal to or, for any period prior to the last such period, greater than the product of (i) the sum of the Additional Asset Value as of the Bank Closing and the value and purchase price of the assets purchased pursuant to subsection 3.2(d) hereof multiplied by (ii) the percentage set forth opposite such date in the table below:

<u>Date Following The Bank Closing</u>	<u>Percentage</u>
30th day	20%
60th day	50%
90th day	70%
120th day	80%
150th day	90%
180th day	100%

provided however that, solely for this purpose, no purchase of securities listed on Schedule F or selected pursuant to subsection 3.3(a) within 25 days after the Bank Closing shall be taken into account and the value of any securities so purchased shall be deducted from the Additional Asset Value as of the Bank Closing.

(b) On or before each of the dates specified below, the Assuming Bank shall have rejected Available Assets, and assets listed on Schedule E, by notice to the Receiver or inclusion in Schedule E, having an aggregate Book Value of not less than:

(i) in the case of the following dates, the amount set forth opposite such date in the following table (excluding, for the purpose of this subdivision (i), the value of securities rejected or deemed rejected pursuant to subsection 3.3(a) or by being listed on Schedule E):

<u>Date Following The Bank Closing</u>	<u>Book Value of Assets to be Rejected by Such Date</u>
30th day	\$100,000,000
60th day	300,000,000
90th day	500,000,000

and (ii) in the case of the following dates, an aggregate of:

(A) \$500,000,000, plus

(B) the difference between the Book Value of the Available Assets required to be rejected under this Agreement and \$500,000,000 multiplied by the percentage set forth opposite such date in the table below:

<u>Date Following The Bank Closing</u>	<u>Percentage</u>
120th day	30%
150th day	60%
180th day	100%

(c) Assets listed on Schedule E or F shall, for the purpose of the foregoing computations, be deemed to have been rejected or purchased, respectively, as of the Bank Closing. The computations involved in determining the amounts of assets required to be rejected shall be based on Book Value whether or not the assets have been appraised.

(d) Asset selections may be made at any time, but, except as otherwise provided in this Agreement, rejections may be made no more frequently than once each week.

(e) In the event that, by the end of any period specified above, the Assuming Bank does not, by notice, select or purchase the percentage of Additional Asset Value required or does not, by notice, advise the Receiver that it has rejected the required amount of Available Assets, the Receiver, upon such consultation with and notice to the Assuming Bank as it deems reasonable, may designate the Available Assets which are deemed selected, purchased and rejected during the period. The parties recognize that the Additional Asset Value as of the Bank Closing will be adjusted from time to time as provided in this Agreement and that the requirements of this subsection 3.4 accordingly will be based upon the best information available at a reasonable time prior to the time such requirements are to be met. Selections, purchases and rejections shall be final and irrevocable, whether made by the Assuming Bank or by the Receiver, except as otherwise provided in this Agreement.

(f) Notwithstanding any other provision of this Agreement, in the event the Assuming Bank rejects a loan which has been expressly secured by a time or demand deposit of the Bank which has been assumed by the Assuming Bank pursuant to subsection 2.1 hereof, the

Assuming Bank shall hold such deposit subject to such security interest and shall not pay such deposit except under the terms of any security agreement (unless the loan is in default) or with the approval of Receiver or as may be required by law. When a loan secured otherwise than as set forth above is rejected, the Assuming Bank shall deliver (without recourse or warranty) to the Receiver at the time of rejection all collateral (or evidences thereof) securing the loan then or thereafter in the possession of the Assuming Bank.

(g) Whenever the Additional Asset Value is reduced to zero, and, in any event, 180 days after the Bank Closing, all remaining Available Assets shall be deemed rejected.

### *3.5 Extensions and Modifications of Loans.*

During the period 80 days after the Bank Closing, the Assuming Bank may, without prior approval of the Receiver and without prejudice to the Assuming Bank's right to reject a particular loan, (i) extend the maturity of or postpone any payment of principal or interest on the loan for up to 90 days, (ii) increase the rate of interest on the loan or, if in accordance with the contract, reduce the rate of interest on the loan or (iii) modify any other terms of the loan provided the repayment schedule is not modified otherwise than as permitted by clause (i) of this subsection, collateral is not released without substitution of comparable collateral of equal or greater value, payment of interest or principal is not waived or subordinated and any other person who is obligated on such loan is not released; the substitution of new accounts receivable in accordance with the terms of an agreement with a customer of the Bank in existence at the Bank Closing for cash received in payment of accounts receivable previously assigned to the Bank or the Assuming Bank shall be deemed to satisfy the requirements of the foregoing clause (iii). Any such extensions or modifications are to be in accordance with prudent banking practice (taking into account the information reasonably available to the Assuming Bank when the decision to extend or modify is made).

### *3.6 Advances by the Assuming Bank.*

Advances to a customer of the Bank who was indebted on a loan (including indebtedness drawn down as part of a line of credit) which is

a part of the Additional Assets (an "Outstanding Loan") may be made by the Assuming Bank under the following circumstances and with the following results:

(a) Where the Assuming Bank has an existing loan relationship (including that of syndicate manager but excluding an interest in a syndicated loan for which some other bank is the syndicate manager) with a customer of the Bank, advances on an Outstanding Loan to that customer may be made by the Assuming Bank without consultation with or prior approval of the Receiver, but any advances so made shall be solely for the account of the Assuming Bank. If the Outstanding Loan is rejected by the Assuming Bank, it shall have a participation interest in the Outstanding Loan and such advances as provided in paragraph (i) of this subsection 3.6.

(b) Where a bank other than the Assuming Bank is the manager of a syndicated Outstanding Loan in which both the Bank and the Assuming Bank have an interest, advances in accordance with the syndicate or participation agreement may be made by the Assuming Bank during the 60 days after the Bank Closing as a result of the Bank's interest without consultation with or prior approval of the Receiver, so long as the Assuming Bank makes a similar advance pursuant to such agreement for its own account. Advances on account of the Assuming Bank's interest shall be solely for its account. Advances on account of the Bank's interest shall be solely for the account of the Assuming Bank if it selects such Loan or participation from the Additional Assets; but if such Loan or participation is rejected, such advances shall be for the Receiver's account.

(c) In the case of an Outstanding Loan which is a construction loan, and where, under normal banking practices, there is considered to be a take-out commitment (and such commitment is in writing) other than from the Bank or an affiliate of the Bank known to be such by the Assuming Bank, the Assuming Bank may make additional advances on the Outstanding Loan during the 180 days after the Bank Closing in accordance with certification and other take-down requirements of the existing Outstanding Loan documents, where the conditions for such additional advances have been met in accordance with normal banking practices, without consul-

tation with or prior approval of the Receiver. If the Outstanding Loan is selected by the Assuming Bank from the Additional Assets, the advances shall be for the account of the Assuming Bank; but if the Outstanding Loan is rejected, such advances shall be for the Receiver's account.

(d) Additional advances on Outstanding Loans which do not fall within paragraphs (a), (b) or (c) of this subsection 3.6 may be made by the Assuming Bank during the 30 days after the Bank Closing without consultation with or prior approval of the Receiver so long as the aggregate unpaid principal amount of all advances made under this paragraph (d) does not exceed \$25,000,000 at any time during such 30-day period. If the Outstanding Loan is selected by the Assuming Bank from the Additional Assets, the advances shall be for the account of the Assuming Bank; but if the Outstanding Loan is rejected, such advances shall be for the Receiver's account.

(e) Additional advances with respect to Outstanding Loans not falling within paragraphs (a), (b), (c) or (d) of this subsection 3.6 may be made with or without prior approval of the Receiver. If such prior approval is obtained, the Assuming Bank may either select or reject the Outstanding Loan. If such Loan is selected, the advance shall be for the account of the Assuming Bank. If such Loan is rejected, the advance will be paid for in cash by the Receiver. If such prior approval is not obtained and the Outstanding Loan is selected by the Assuming Bank, it shall select the entire amount of the Outstanding Loan computed at the Bank Closing and all advances made thereon shall be for the account of the Assuming Bank. If such prior approval is not obtained and the Outstanding Loan is rejected by the Assuming Bank, it shall have a participation interest in the Outstanding Loan and such advances as provided in paragraph (i) of this subsection 3.6.

(f) Notwithstanding paragraphs (a), (b), (c), (d) and (e) of this subsection 3.6, without the Receiver's prior approval no advance shall be made except for the account of the Assuming Bank (i) with respect to Outstanding Loans classified as Substandard, Doubtful or Loss in the August 1974 examination of the Bank by the Comptroller of the Currency or (ii) if the Receiver notifies the Assuming Bank prior to the advance not to make any further

advances with respect to that customer. If such prior approval for an advance is not obtained and the Outstanding Loan is selected by the Assuming Bank, the advance shall be for the account of the Assuming Bank. The Outstanding Loan may be rejected by the Assuming Bank, but it shall have a participation interest in the Outstanding Loan and such advances as provided in paragraph (i) of this subsection 3.6.

(g) Upon the rejection of an Outstanding Loan on which the Assuming Bank has made advances which prove to be for the account of the Receiver and which are not to be paid for in cash pursuant to subsection 3.6(e) hereof, the Assuming Bank shall, within the succeeding 30 days, select and purchase, in the manner provided in Section 3 or 4 hereof, Available Assets of a value and purchase price equal to the amount of such advances without any reduction as a result of such selection and purchase in the Additional Asset Value.

(h) Within fifteen days of the making of any advance with respect to an Outstanding Loan, the Assuming Bank shall deliver to the Receiver a statement setting forth the advances made, to whom they were made, information as to the existence or non-existence of a borrowing relationship with the Assuming Bank and other information sufficient to enable the Receiver to determine the applicability of particular provisions of this subsection 3.6.

(i) In the event the Assuming Bank makes one or more advances on an Outstanding Loan, rejects such Outstanding Loan and is to have a participation interest in such Outstanding Loan and such advances, pursuant to subsection 3.6(a), (e) or (f) hereof (hereinafter called the "Advances" and the principal amount of the Outstanding Loan plus the principal amount of all Advances theretofore made less the amount of all payments and collections theretofore received and applied to principal being called the "Debt"), any payments or collections on the Debt received subsequent to the making of the first Advance shall, upon such rejection, be applied for the account of the Assuming Bank to the extent the Assuming Bank would have been entitled to participate in such payment or collection had it acquired through the making and at the time of each Advance a pari passu participation interest in the Debt in the same ratio as the unpaid principal amount of such



Advance bears to the then Debt. Following such rejection and after such application, the Assuming Bank shall have a pari passu participation interest in the Debt in the ratio which the outstanding principal amount of all such Advances bears to the then outstanding Debt. All payments or collections on such Debt, whether received before or after rejection, shall be applied pro rata, first, to accrued interest and, second, to unpaid principal.

### **3.7 Servicing Arrangements.**

(a) The Assuming Bank agrees to service all Additional Assets (but only until such assets are either selected or rejected by the Assuming Bank) in accordance with normal and prudent banking practices, but subject to the other provisions of this Agreement and giving due recognition to the Assuming Bank's lack of familiarity with the Additional Assets. The Assuming Bank shall exercise reasonable diligence with respect to collections. The Receiver will pay the Assuming Bank \$200,000 at the end of every 30 days during the 180 day period following the Bank Closing, as a fee for the servicing of those Additional Assets.

(b) During the 180-day period following the Bank Closing, the Assuming Bank shall hold (on a non-segregated basis) for the benefit of itself and the Receiver all principal, interest, dividends, premiums, rental income from the Real Estate (as hereinafter defined) and other payments, income or distributions on the Available Assets. Any such amounts received with respect to assets selected by the Assuming Bank shall be for its account; and, subject to the provisions of subsection 3.6(i) hereof, any such amounts received with respect to assets rejected by the Assuming Bank shall be for the account of the Receiver and shall be paid to the Receiver at the time such assets are rejected by the Assuming Bank, together with interest computed at the Assuming Bank's prime rate from the date of receipt by the Assuming Bank to the date of payment by the Assuming Bank to the Receiver.

(c) The Assuming Bank agrees that after the Bank Closing it will, if requested, act as agent for the Receiver at locations where the Assuming Bank has an office to hold for safekeeping assets of the Receiver located outside the United States and to receive and remit to the Receiver, in accordance with the Receiver's instructions, any payments of principal, interest or otherwise made on such assets which



are paid or payable at locations outside of the United States. The Assuming Bank's obligation shall be limited to the safekeeping of such assets and to receive and remit such payments and it shall have no obligation to take any action to enforce any obligation owed the Receiver on any such asset. The Assuming Bank shall be reimbursed by the Receiver for reasonable out-of-pocket expenses incurred in carrying out its obligations under this subsection 3.7(c).

### **3.8 *Right of First Refusal.***

Other than assets to be sold in an established securities or currency trading market or at an auction, the Assuming Bank shall have the right of first refusal on all assets rejected by the Assuming Bank and thereafter offered for sale by the Receiver on terms no less favorable to the purchaser than those offered by an unrelated third party. Such right of first refusal shall be limited, however, to any asset or group of assets which are offered for sale by the Receiver at a price in excess of \$100,000 within the period of one year following the Bank Closing, and such right must be exercised by delivery of notice to the Receiver within two banking business days following notice from the Receiver that it intends to sell the assets or group of assets and the terms of the proposed sale. The Assuming Bank shall also have the right at any time to purchase, for cash, loans held by the Receiver at their then book value plus accrued interest or less unearned discount, as the case may be.

## **SECTION 4. PURCHASE AND SALE OF OTHER ASSETS; ASSIGNMENTS OF AND SUBLASES UNDER LEASES.**

### **4.1 *General.***

(a) The Receiver hereby grants to the Assuming Bank an option to purchase the entire interest of the Bank and the Receiver and any subsidiary of the Bank in and to any or all of the assets (other than leases) of the Bank and its subsidiaries described in this Section 4 as available for purchase, for the purchase price arrived at as set forth below with respect to each asset and within the time limitations specified in this Section 4. Upon the purchase by the Assuming Bank of any such asset, the Additional Asset Value shall be reduced by an amount equivalent to the purchase price with respect to the purchased

asset, subject to the adjustments set forth in this Agreement. If an asset is purchased prior to an appraisal required by this Section 4, the amount of such reduction shall initially be the Book Value of such asset (less the amount of any outstanding indebtedness for borrowed or purchase money secured by any mortgages or other liens to which such asset may be subject) and shall thereafter be adjusted for the difference between the Book Value and the fair market value of such asset. The Assuming Bank may terminate such option as to any such asset at any time, whereupon such asset shall, for the purposes of this Agreement, be deemed rejected and no longer a part of the Available Assets. The Receiver shall hold available for such purchase each such asset until, and the option herein granted shall terminate upon, the earlier of (i) 180 days after the Bank Closing, (ii) the date on which such asset has been rejected by the Assuming Bank or (iii) the date upon which the Additional Asset Value shall become zero.

(b) The Receiver hereby grants to the Assuming Bank an option in accordance with this Section 4 to receive an assignment of or sublease under any lease to the Bank or Franklin Buildings, Inc. ("FBI") other than any lease of property owned by FBI, to the extent consistent with the provisions of the particular lease and the rights of the parties thereto.

#### **4.2 Real Property.**

(a) The Assuming Bank may, by notice to the Receiver, exercise its option to purchase the fee of any parcel of real property, including all improvements and fixtures thereon, owned by the Bank or by FBI at the Bank Closing (the "Real Estate"). The purchase price of each parcel of the Real Estate shall be its fair market value at the Bank Closing as determined pursuant to subsection 4.2(b) hereof (less the amount of any outstanding indebtedness for borrowed or purchase money secured by any mortgages or other liens to which such parcel may be subject). In no event shall any parcel of the Real Estate have a purchase price of less than zero.

(b) Within 150 days after the Bank Closing, the Receiver shall, as to each parcel of the Real Estate, unless such parcel was previously rejected by the Assuming Bank pursuant to subsection 3.4 hereof, cause the title of such parcel to be examined by a title company or companies to be designated by agreement between the Receiver and the Assuming

Bank (the "Title Company") and cause such parcel to be appraised by James D. Landauer Associates, Inc. (the "Property Appraiser") to determine its fair market value as of the Bank Closing. The fair market value of each such parcel shall be determined on the assumption that such parcel is sold as an asset in an all cash sale between a willing seller and purchaser for the same use as such parcel was being used by the Bank at the Bank Closing without regard to any business associated therewith, it being intended that goodwill not be a factor in such appraisal; however, such appraisal shall take into account all encumbrances affecting the parcel or the title thereto, but without taking into consideration any mortgage or other lien securing any outstanding indebtedness for borrowed or purchase money or any of the present leases to the Bank of the Real Estate owned by FBI. If any such parcel has space which at the Bank Closing was not used by the Bank in the branch operations of any branch of the Bank and such space is not currently occupied by a tenant or subtenant, the Property Appraiser shall also take into account the cost which an owner of such parcel might reasonably incur in preparing such space for use by a prospective tenant or subtenant thereof.

(c) If the Assuming Bank exercises its option to purchase any parcel of the Real Estate, the Receiver shall convey or cause to be conveyed title thereto by bargain and sale deed without covenants to the Assuming Bank as soon thereafter as practicable. The title to be conveyed will be such title as the Title Company shall have certified in its title report prepared pursuant to subsection 4.2(b) hereof, subject to the title exceptions therein set forth, except that prior to the conveyance of title of any parcel of the Real Estate owned by FBI, the Receiver agrees to (i) have such parcel released from the lien of certain mortgages and supplemental mortgages to Bankers Trust Company, as trustee, which the parties understand presently secure an indebtedness of FBI of approximately \$21,000,000, (ii) cancel any lease (such cancellation, however, to be subject to the rights of subtenants, if any) of such parcel by FBI to the Bank, (iii) have such parcel released from the lien or other encumbrance of any other security instruments, if any, pertaining to the indebtedness referred to in clause (i) above, (iv) take such action as may be required in order that the Assuming Bank shall have no obligations with respect to such mortgages or security instruments, the obligations secured thereby or such leases (except as to sub-

tenants, if any, under such leases, as provided in subsection 4.5 hereof) and (v) cause all title exceptions relating to clauses (i) and (ii) above or to the security instruments referred to in clause (iii) above to be deleted from said title report. The Receiver agrees at the request of the Assuming Bank to use its reasonable best efforts (other than the payment of any money) to cause the removal of all other liens, burdens or encumbrances to which the title may be subject. If title is conveyed to the Assuming Bank subject to any mortgages or other liens securing any outstanding indebtedness for borrowed or purchase money, the Assuming Bank shall assume the same unless such indebtedness was without recourse to the Bank.

(d) The Receiver shall bear the costs of conveyance usually and customarily borne by the seller of real property in the place in which the property is situated except those from which the Receiver may be exempt; provided, however, the Receiver shall pay real property transfer taxes to the extent that the Receiver's exemption therefrom imposes an additional tax burden on the Assuming Bank. The Assuming Bank shall bear that portion of the costs of such conveyance usually and customarily borne by the purchaser of real property in the place in which the property is situated. Closing adjustments shall be as of the Bank Closing and, unless otherwise provided in this Agreement (it being understood that neither the Receiver nor the Assuming Bank shall be required to bear any cost or expense more than once), shall be in accordance with the Customs in Respect to Title Closings as published by the Real Estate Board of New York, Inc.

#### **4.3 *Leasehold Interests.***

(a) The Assuming Bank may, by notice to the Receiver, exercise its option to obtain an assignment of any lease (other than a lease of any parcel of the Real Estate and/or personal property owned by FBI in effect at the Bank Closing) to the Bank or FBI covering real and/or personal property in effect at the Bank Closing or a sublease under any such lease of all of the property subject to such lease for the balance of the term thereof and, to the extent requested by the Assuming Bank, any renewal terms which can be exercised (less, in the case of a sublease, such period of time as is necessary for the sublease to be a sublease and not an assignment), and on the same terms, including the amount of rent, provided in such lease, to the extent consistent with the

provisions of such lease and the rights of the parties thereto. The Assuming Bank's option shall terminate if the Assuming Bank gives notice to the Receiver that it does not intend to exercise its option or if the option is not exercised within 120 days after the Bank Closing except that as to such leases as the Receiver shall designate by notice prior to the expiration of said 120 day period the option shall continue until terminated by 10 days notice by the Receiver to the Assuming Bank. The Assuming Bank agrees to exercise its option under this subsection 4.3(a) or to give notice that it does not intend to exercise such option as promptly as feasible after the Bank Closing.

(b) Upon the exercise by the Assuming Bank of its option as to any lease, the Receiver shall execute and deliver to the Assuming Bank an appropriate assignment of or sublease under such lease, and the Assuming Bank shall assume all obligations of the Bank and the Receiver under such lease as of the Bank Closing. In the case of any lease as to which the option has terminated, the Receiver shall use its best efforts (but shall not be obligated to assume the obligations of the Bank under such lease) to enable the Assuming Bank to have access to the leased premises for a reasonable period of time following the Bank Closing. No exercise of the option granted pursuant to subsection 4.1(b) hereof shall affect the Additional Asset Value or the obligation of the Assuming Bank to purchase assets under subsection 3.4 hereof.

(c) In the case of any lease as to which the Assuming Bank desires an assignment or sublease but as to which either there are terms and conditions which in the reasonable judgment of the Assuming Bank are onerous, the fair use value, determined pursuant to subsection 5.8 hereof, is less than the rental required by the lease or the holder of the lessor's interest has the right to refuse to consent to such assignment or sublease and has refused to consent thereto on reasonable conditions, the Receiver agrees to use its reasonable best efforts to cause the lessor to eliminate such onerous terms and conditions, to reduce such rental to an amount equal to the fair use value or to obtain the consent of the lessor to such assignment or sublease on reasonable conditions.

#### **4.4 Other Personal and Real Property.**

(a) The Assuming Bank may, by notice to the Receiver, exercise its option to purchase any furniture, trade fixtures or other tangible



personal property, including computer programs, which at the Bank Closing were owned by the Bank or by FBI (the "Personalty") or any leasehold improvements (other than in respect of the Real Estate owned by FBI, the leasehold improvements on which are being treated as improvements pursuant to subsection 4.2(a) hereof) installed at the expense of the Bank. Upon the purchase of any Real Estate pursuant to subsection 4.2 hereof or the taking of an assignment of or sublease under any lease pursuant to subsection 4.3 hereof or the execution of any new lease by the Assuming Bank of premises leased by the Bank at the Bank Closing, the Assuming Bank shall exercise its option to purchase all Personalty and, in the case of any lease, all leasehold improvements, installed at the expense of the Bank, in each case used by the Bank in the branch operations of its branch at such location.

(b) The purchase price of the Personalty and leasehold improvements purchased by the Assuming Bank pursuant to subsection 4.4(a) hereof shall be the fair market value thereof at the Bank Closing determined in accordance with subsection 4.4(d) hereof (less the amount of any outstanding indebtedness for borrowed or purchase money secured by mortgages, chattel mortgages, security interests or other liens affecting such Personalty or leasehold improvements, unless such indebtedness was applied in reduction of the fair market value of the Real Estate purchased pursuant to subsection 4.2 hereof). Notwithstanding the foregoing, computer programs included in the Personalty shall have a purchase price of zero. In no event shall any Personalty or leasehold improvements have a purchase price of less than zero; provided, however, that if any Personalty required by subsection 4.4(a) hereof to be purchased would otherwise have a purchase price of less than zero, the Assuming Bank may elect not to purchase such Personalty.

(c) If requested by the Assuming Bank, prior to the assignment of, or sublease to the Assuming Bank under, any lease pursuant to subsection 4.3(a) hereof or the execution of any new lease by the Assuming Bank of real property leased by the Bank, or as soon thereafter as is feasible, the Receiver shall cause the Title Company to issue a report of search showing claims or liens, if any, against the leasehold improvements other than interests of landlords under the lease or interests of subtenants under leases, if any. Such search and report shall be paid for by the Assuming Bank.

(d) Within 150 days after the Bank Closing, the Personalty and leasehold improvements installed at the expense of the Bank shall be

appraised by the Property Appraiser to determine fair market value at the Bank Closing, such fair market value to be determined on the assumption that the item of Personalty or such leasehold improvement is sold as an asset in an all cash sale between a willing seller and purchaser for the same use as such item or improvement was being used by the Bank at the Bank Closing without regard to any business associated therewith, it being intended that goodwill not be a factor in such appraisal, and that as to such leasehold improvements there shall also be taken into account the balance of the term of the respective lease and the length of the term under each option to extend the original term of or to renew such lease.

(e) The Assuming Bank may, by notice to the Receiver, exercise its option to purchase (i) all outstanding shares of any wholly owned subsidiary of the Bank (other than FBI) or purchase all of the assets and assume all of the liabilities of any such subsidiary at a purchase price equal to the fair market value of such stock determined by the Securities Appraisers, (ii) all right, title and interest of the Receiver and the Bank in any financing leases by the Bank or participations in any financing leases to others of personal property, including the interest of the Bank and the Receiver in such personal property, at a purchase price equal to the Book Value thereof, and (iii) any other tangible or intangible assets owned by the Bank (except stock of the FRB and FNB Bradford Stock Services, Inc.) not otherwise covered by this Agreement, at such purchase price as may be agreed upon by the Receiver and the Assuming Bank, except that if the Assuming Bank elects to purchase a part of the name of the Bank, its purchase price for purposes of this Agreement shall be zero.

(f) The Assuming Bank agrees that upon the purchase, assignment or sublease of any property pursuant to this Section 4, or upon the execution of any new lease by the Assuming Bank with respect to any property leased by the Bank, it shall purchase all prepaid expenses relating to such property, at a purchase price equal to the Book Value thereof.

(g) The Receiver shall execute and deliver or cause to be executed and delivered to the Assuming Bank appropriate bills of sale or other transfer instruments transferring to the Assuming Bank all the right, title and interest of the Receiver, the Bank or any subsidiary of the Bank in and to any property purchased by the Assuming Bank pursuant to this subsection 4.4.



#### **4.5 Leases and Subleases to Third Parties.**

If, on the effective date of the purchase, assignment or sublease of any property pursuant to this Section 4, such property is subject to a lease or sublease to a third party, the Assuming Bank shall accept such property subject to such lease or sublease to a third party of which lease or sublease the Assuming Bank has actual or constructive notice, and the Assuming Bank agrees to assume all obligations of the Bank and the Receiver with respect thereto. The Assuming Bank shall continue to be liable pursuant to subsection 2.1(h) hereof for any security deposits by such third parties; however, if the Assuming Bank does not exercise its option to purchase any such property or to receive an assignment of or sublease under the lease thereof or does not enter into a new lease with respect to such leased property, the Assuming Bank shall return to the Receiver an amount equal to the security deposits of all third parties relating to such property and the Assuming Bank's liability with respect to such security deposits pursuant to subsection 2.1(h) hereof shall be cancelled.

#### **4.6 Sales and Use Taxes.**

All sales or use taxes (but excluding any real property transfer taxes) which may be imposed on a transfer of any property to the Assuming Bank pursuant to this Section 4 shall be the obligation of the Assuming Bank.

#### **4.7 Receiver's Assistance.**

In the event the Assuming Bank requests any disposition of any of the property referred to in this Section 4 other than as provided for in this Section 4, the Receiver agrees to use its best efforts to cooperate with the Assuming Bank in accomplishing such requested disposition provided such request is reasonable in the Receiver's sole discretion and does not impair and is not inconsistent with the rights, duties and obligations of the Receiver.

#### **4.8 Right to Designate Grantee, Assignee or Sublessee.**

In each situation under this Section 4 in which the Assuming Bank is entitled to purchase any asset of the Bank or any subsidiary or to have an assignment of a lease to the Bank or to receive a sublease of any property held by the Bank under a lease, the Assuming Bank may

designate one or more persons, firms or corporations as the grantee of such asset, the assignee of such lease or the sublessee of such sublease, provided that the Assuming Bank shall, contemporaneously therewith, agree to guarantee to the Receiver the performance by such substitute grantee, assignee or sublessee of any obligation which the Assuming Bank would have been required to assume had it been the grantee, assignee or sublessee in the transaction.

#### **SECTION 5. USE OF PROPERTY**

##### ***5.1 Operation of Banking Offices by Assuming Bank.***

Provided it is granted appropriate permission by the Comptroller of the Currency, the Federal Reserve Board, the Corporation and/or the applicable state supervisory agency, whichever has jurisdiction, the Assuming Bank will exert its best efforts (with the assistance of the Receiver and as to the use of any property solely as the licensee of the Receiver) to reopen, continue to operate and use for business, commencing on the first business day after the Bank Closing, all domestic banking offices and domestic banking branches used by the Bank at the Bank Closing and listed on Schedule H hereto. Any such office or branch may be closed and its use discontinued within 30 days after the Bank Closing only if the Corporation, with the advice of the appropriate bank supervisory agency or agencies, determines that such discontinuance will not adversely affect the convenience and needs of the public.

##### ***5.2 Use of Owned Property by Assuming Bank.***

The Assuming Bank shall have the right to use, solely as the licensee of the Receiver, any property owned by the Bank or FBI, or any property owned by any other subsidiary of the Bank and used by the Bank in its banking business at the Bank Closing, for a period which shall commence at the Bank Closing and continue until the date of any purchase thereof or termination of the option with respect thereto pursuant to Section 4 hereof.

##### ***5.3 Use of Leased Property by Assuming Bank.***

The Assuming Bank shall have the right to use, solely as the licensee of the Receiver, any property leased by the Bank (other than property owned by FBI) or by FBI, or any property leased by any other subsidiary of the Bank and used by the Bank in its banking

business at the Bank Closing, for a period which shall commence at the Bank Closing and continue until the date of any assignment of or sublease under the lease thereof or of the execution of any new lease thereof or termination of the option with respect thereto pursuant to Section 4 hereof.

#### **5.4 Maintenance.**

The Assuming Bank shall maintain all property which it uses pursuant to this Section 5 in as good condition as when received, reasonable wear and tear and damage by fire and other casualty excepted.

#### **5.5 Insurance.**

Until the later of (a) the date the Assuming Bank's use of any property, as licensee of the Receiver, pursuant to this Section 5 is discontinued or (b) the date of any purchase, assignment or sublease with respect to such property or of the execution of any new lease thereof or termination of the option with respect thereto pursuant to Section 4 hereof, the Assuming Bank shall carry insurance coverage, including public liability insurance, on all such property used by the Assuming Bank to the same extent as it or its bank affiliates do with respect to comparable property owned or used by the Assuming Bank, and all such insurance policies shall insure the Receiver, the Assuming Bank and all other interested parties as their interests may appear. In the event of any loss as to any such property (i) the Assuming Bank's right to purchase or obtain an assignment or sublease with respect to such property shall not be impaired; (ii) property to be purchased shall be valued as of the Bank Closing; (iii) if the Assuming Bank purchases or obtains an assignment, sublease or new lease with respect to such property, the insurance proceeds payable to the Receiver and to the Assuming Bank shall be paid to the Assuming Bank; and (iv) if the Assuming Bank does not purchase or obtain an assignment, sublease or new lease with respect to such property, the insurance proceeds payable to the Receiver and to the Assuming Bank shall be paid to the Receiver. As to property which the Assuming Bank has a right to purchase, the parties agree that Section 5-1311 of the General Obligations Law of the State of New York shall have no application in the event of loss or damage by fire or other casualty. The Assuming Bank agrees to give the Receiver not less than five business days advance notice of its intention to discontinue use of any property used by the Assuming Bank pursuant to this Section 5.

**5.6 License Fees, Expenses and Adjustments.**

(a) If the Assuming Bank uses, as the licensee of the Receiver, and purchases pursuant to Section 4 hereof any Real Estate, Personalty or leasehold improvements installed at the expense of the Bank, it shall not, except as set forth below, be required to pay any license fee to the Receiver for any use of such property prior to the date of its purchase. If the Assuming Bank's option to purchase terminates pursuant to Section 4 hereof as to any Real Estate, Personalty or leasehold improvements installed at the expense of the Bank which the Assuming Bank has used as the licensee of the Receiver, the Assuming Bank shall pay a license fee, in cash, to the Receiver equal to the fair use value, as determined pursuant to subsection 5.8 hereof, for its use of such property to the later of (i) the date such use is discontinued or (ii) the date the option to purchase such property is terminated. Whether or not any Real Estate is purchased, the Receiver shall be responsible for the payment of all real estate taxes with respect thereto payable during the period of use by the Assuming Bank. The Assuming Bank shall reimburse the Receiver (A) in respect of the portion of any real estate taxes paid by the Receiver subsequent to the Bank Closing, if any, assumed by the Assuming Bank pursuant to subsection 2.1 hereof and (B) for the portion of such taxes, if any, paid by the Receiver in respect of any Real Estate purchased by the Assuming Bank and relating to the period subsequent to the Bank Closing. The Assuming Bank, on behalf of the Receiver and as an additional license fee, shall be responsible for all normal and recurring maintenance, utility and other expenses incidental to its use of such property until the date of the purchase thereof or the later of the dates set forth in clauses (i) and (ii) above.

(b) With respect to any leased property within the purview of subsection 4.3 hereof which the Assuming Bank uses, as the licensee of the Receiver, until the date of any assignment of or sublease under the lease thereof or of the execution of any new lease thereof or the later of (i) the date such use is discontinued or (ii) the date the option to obtain an assignment of or sublease under the lease of such property is terminated, the Assuming Bank shall pay an interim license fee to the Receiver in cash equal to the rent and additional rent stipulated in the respective leases of such property (excluding any acceleration thereof

asserted by the lessor), less any rent payable by any sublessee for any period after the Bank Closing to the Receiver. Such interim license fee shall be paid no less than three business days prior to the date such rent or additional rent payment is due and payable. The Assuming Bank shall use its best efforts to collect, as agent for the Receiver, all rent from sublessees, and any such rent received by the Assuming Bank shall be paid by the Assuming Bank to the Receiver promptly after the receipt thereof. If the Assuming Bank uses, as licensee of the Receiver, and obtains an assignment of or sublease under the lease of such property or executes a new lease thereof, any interim license fee paid by the Assuming Bank to the Receiver shall be a credit against the Assuming Bank's liability in respect to such lease and, in the event the Assuming Bank is not given full credit under such lease for such interim license fee, the Receiver shall pay to the Assuming Bank in cash any deficiency less rent payable by any sublessees for any period after the Bank Closing but not collected and paid over to the Receiver. If the Assuming Bank does not obtain an assignment of or sublease under the lease of such property or does not execute a new lease thereof, the Assuming Bank shall pay to the Receiver, in cash, a license fee equal to the fair use value thereof, as determined pursuant to subsection 5.8 hereof, for its use of that portion of such property not occupied by sublessees, excluding leasehold improvements thereon, against which license fee there shall be credited any interim fee paid by it to the Receiver. To the extent that, after such credit, there is a net amount due to the Receiver from the Assuming Bank, such net amount shall be paid in cash and, to the extent that there is a net amount to be paid by the Receiver to the Assuming Bank, such net amount shall be paid in cash. The Assuming Bank's use, as licensee of the Receiver, of any leased real or personal property shall be subject to the terms of the respective governing leases, and the Assuming Bank shall use its best efforts to comply, as licensee of the Receiver, with the terms of such leases, except for the making of any payments of rent or additional rent thereunder. Any responsibility for the payment of rent and additional rent or other payment for use of any premises as may be required by law shall be the responsibility of the Receiver. The Assuming Bank shall, to the extent not provided for in the applicable lease, on behalf of the Receiver and as an additional license fee, be responsible for all normal and recurring maintenance, utility and other expenses incidental to its use of such leased premises.



#### **5.7 Office Space for the Receiver and Corporation.**

The Receiver may reserve for itself and the Corporation adequate furnished space (including cabinet and vault space) in any premises previously occupied by the Bank, at such of the Bank's locations as the Receiver and the Corporation determine are necessary in connection with their duties, including liquidation of the remaining assets and property of the Bank, and the Assuming Bank shall make such furnished space available at any premises to which records, assets and property of the Bank may, with the prior approval of the Receiver, have been removed by the Assuming Bank. The adequacy of the space as well as its location shall be determined by the Receiver and the Corporation in a reasonable manner giving due consideration to the requirements of the Assuming Bank. If the Assuming Bank purchases or obtains an assignment, sublease or new lease of such premises in which the Receiver has reserved space for itself and the Corporation, the Receiver and the Corporation shall pay to the Assuming Bank, in cash, the fair market rental value, as determined by the Property Appraiser, for their respective occupation of the premises from 180 days after the Bank Closing to the date that the premises are vacated by the Receiver or the Corporation. No payment shall be made to the Assuming Bank for such occupation of premises not so acquired.

#### **5.8 Determination of Fair Use Values.**

The fair use values provided for in this Section 5 shall be equal to the fair market rental value of the property as determined by the Property Appraiser (i) taking into account when the use of leased property is being valued, the services furnished by the lessor under the respective lease and included in the periodic rent without additional charge and (ii) taking into account when the use of owned property is being valued that all normal and recurring operating expenses incidental to the use thereof are paid by the Assuming Bank and that real estate taxes are being paid by the Receiver.

#### **5.9 Nature of Use.**

Any use of any property by the Assuming Bank pursuant to this Section 5 shall be as a licensee of the Receiver, it being the intention of the parties that no such use shall be deemed to be or cause a ratification, rejection, assignment, sublease or exercise of an option to select to receive an assignment or sublease of any lease of real or personal property, or the exercise of any option to renew or purchase same.

**SECTION 6. FIDUCIARY RELATIONSHIPS.**

The Assuming Bank does not assume any of the fiduciary relationships of the Bank as fiscal or transfer agent, trustee, guardian, receiver, committee, executor, administrator or other fiduciary in any capacity or as custodian, bailee or depository of personal property (except the duties and obligations assumed under Section 7 hereof).

**SECTION 7. SAFE DEPOSIT BOXES, SAFEKEEPING AND  
CONSIGNMENT ITEMS, AND ESCROW AGREEMENTS.**

The Assuming Bank agrees to assume and to honor and perform the duties and obligations of the Bank regarding its safe deposit boxes, safekeeping of property, escrow agreements and money and other property held thereunder and all items held on consignment which the Receiver hereby assigns and transfers to the Assuming Bank together with all records and keys relating thereto, provided the Assuming Bank (unless it is the owner or lessee thereof) continues to have access to the physical premises on which the same is located. Rental and other fees shall be prorated as of the Bank Closing. If the Assuming Bank does not purchase any such premises pursuant to subsection 4.2 hereof, or does not obtain an assignment of or sublease under the lease of any such premises or obtain a new lease with respect thereto within the 120-day or extended period set forth in subsection 4.3(a) hereof, the Assuming Bank nonetheless assumes full responsibility for closing out or transferring to another location such business in accordance with applicable law even though the closing out or transfer of such business may result in continued use, solely as the licensee of the Receiver, of all or a portion of the premises in question. If the Assuming Bank does not purchase the premises, obtain an assignment of or sublease under the lease of the premises or obtain a new lease with respect thereto and for any period during which the Assuming Bank, as licensee of the Receiver, uses the premises only to meet its obligations under this Section 7, it shall pay to the Receiver a license fee equal to the fair use value determined in accordance with subsection 5.8 hereof of those portions of the premises, including leasehold improvements thereon, containing the safekeeping facilities. The Assuming Bank shall be free to terminate any safekeeping or consignment agreement or activity, and to resign or withdraw as escrow agent under any escrow agreement, in accordance with the terms thereof.



**SECTION 8. CREDIT CARD BUSINESS.**

Except as otherwise provided in Section 9 hereof, the Assuming Bank agrees to assume, honor and perform all duties and obligations regarding the Bank's credit card business in so far as the same relates to consumers and merchants, and the Receiver assigns and transfers to the Assuming Bank all of the Bank's right, title and interest in and to such business.

**SECTION 9. CONTRACTS FOR SERVICES.****9.1 *Service Obligations of the Bank.***

The Assuming Bank, acting on behalf of the Receiver, agrees to perform all duties and obligations of the Bank to render services under contracts outstanding at the Bank Closing requiring the performance of such services, such as, but not limited to, mortgage servicing contracts and electronic data processing time-sharing contracts. The obligations of the Assuming Bank hereunder shall run from the Bank Closing until 30 days thereafter, or such shorter period as may be permitted by the relevant contract. During such 30-day period the Assuming Bank may, at its option, elect to assume (to the extent permitted by the relevant contract) any or all such contracts, and the Receiver agrees to use its reasonable best efforts, to the extent requested by the Assuming Bank and consistent with the provisions of such contract and its responsibilities as Receiver, to assist the Assuming Bank to effect such assumption. Notwithstanding the foregoing, the Assuming Bank shall have no obligation to perform services where the Assuming Bank determines such performance might involve the incurring of significant liabilities or expenses in excess of income therefrom, and so notifies the Receiver. Upon receipt of such notice by the Receiver, the option to assume such contract shall be deemed terminated. Income from all service contracts shall be prorated as of the Bank Closing by making appropriate adjustments in accordance with Section 20 hereof. Notwithstanding any undertakings in this Agreement, the Assuming Bank shall have no obligation to continue to maintain and operate any custodial or similar account for any broker or dealer customer of the Bank to the extent such account has heretofore been used in connection with the clearance of such customer's brokerage or dealer transactions.

**9.2 *Service and Maintenance Contracts.***

With respect to any contract providing for the rendering of services to the Bank outstanding as of the Bank Closing, the Receiver

shall, to the extent and for the period requested by the Assuming Bank, use its reasonable best efforts to make available to the Assuming Bank the continuing benefits of such contract. Within 30 days of the Bank Closing the Assuming Bank shall notify the Receiver of such contracts which it elects to assume and such contracts it elects not to assume but for which it requests the services provided thereby. The Assuming Bank shall pay, at the contract rate, for any services rendered to it pursuant to any such contract after the Bank Closing. The Receiver understands that, if the Assuming Bank is unable to obtain the benefits of certain contracts referred to in this subsection, it may be unable to perform certain of the functions, if any, which may be required of it in connection with the corporate agency business of the Bank referred to in Section 6 hereof. In such case the Receiver agrees to use its reasonable best efforts to assist the Assuming Bank in being relieved of the obligation to perform such functions.

### 9.3 *No Assumption.*

By performing the obligations of the Bank under contracts referred to in subsection 9.1 hereof, or receiving benefits under contracts referred to in subsection 9.2 hereof, the Assuming Bank shall not be deemed to have assumed any such contract nor any liability or obligation in respect of its termination unless the Assuming Bank shall have specifically designated such contract for assumption within the time period provided in subsection 9.1 or 9.2, or its later termination by the Receiver.

### 9.4 *Assignment of Contracts.*

In the event that the Assuming Bank shall assume any contract described in subsection 9.1 or 9.2 hereof, the Receiver shall assign all the Bank's and the Receiver's right, title and interest in such contract so assumed to the Assuming Bank.

## SECTION 10. EMPLOYEES AND EMPLOYEE BENEFITS.

### 10.1 *Employees.*

The Assuming Bank may, if it desires, initially retain any and all employees of the Bank (free of all obligations of the Bank under employment contracts or arrangements and all other employee benefit arrangements, including without limitation any severance or termination payment arrangements) and shall have the right to discharge any employee at any time. The Assuming Bank shall bear all salary ex-

penses of retained employees for the period from the Bank Closing until the Assuming Bank reopens the offices and branches of the Bank. The Assuming Bank shall have no obligation with respect to the settlement of expense advances made by the Bank to employees retained by the Assuming Bank less than five business days following the Bank Closing.

#### **10.2 *Receiver's Use of Employees.***

The Assuming Bank shall make available to the Receiver and the Corporation personnel of the Assuming Bank for consultation and for the performance of minor services during normal banking hours. With the Assuming Bank's permission, the Receiver or the Corporation may, for work to be done over an extended period (two working days), use the services of employees of the Assuming Bank designated by the Receiver or the Corporation and shall reimburse the Assuming Bank for the salary and fringe benefit expenses of such employees for such service rendered after five days following the Bank Closing.

#### **10.3 *Retirement and Employee Benefit Plans.***

The Assuming Bank shall not be deemed to have assumed any obligations under any funded or unfunded retirement plan or other employee benefit plan of the Bank, other than whatever obligation, if any, the Assuming Bank may have to act as trustee pursuant to Section 6 hereof. The Receiver will cooperate with the Assuming Bank in obtaining such binding interpretations of the provisions and such administration of the assets of such plan, and in taking such other action in respect of such plan, as the Assuming Bank may desire, consistent with the best interests of the plan participants. If the Assuming Bank determines that its assumption, if any, of the trusteeships of any one or more of such plans creates a conflict of interest, the Assuming Bank and the Receiver will take such action as is necessary to obtain and have qualified another successor trustee.

### **SECTION 11. DUTIES WITH RESPECT TO DEPOSITORS.**

#### **11.1 *Payment of Obligations and Discharge of Business.***

The Assuming Bank agrees to pay all properly drawn checks, drafts and withdrawal orders presented to it by mail, over its counters

or through clearings by depositors whose deposits are assumed, whether drawn on the check or draft forms provided by the Bank (for at least one year after the Bank Closing) or on those provided by the Assuming Bank, to the extent that the assumed collected balances to the credit of the respective makers or drawers or the respective contracted overdraft privileges (other than those which have been terminated in accordance with their terms by the Assuming Bank) shall be sufficient to permit the payment thereof, and in all other respects to discharge, in the usual course of the banking business, the duties and obligations of the Bank and the Receiver with respect to the balances due and owing at the Bank Closing to the depositors whose deposits are assumed.

#### **11.2 *Depositors' Claims against Receiver.***

If any of the depositors whose deposits are assumed instead of accepting the obligation of the Assuming Bank to pay the deposit liabilities of the Bank and the Receiver, shall assert a claim against the Receiver for any part of any of such assumed deposit liabilities, the Assuming Bank agrees on demand to provide the Receiver with money sufficient to enable it to pay the claims of such depositors at the maturity thereof, not exceeding the amount (excluding for these purposes any amount credited subject to collection until collection is completed) credited to such depositor's account on the books and records of the Assuming Bank as of the time of making such demand. Upon the payment thereof to the Receiver, the Assuming Bank shall be discharged to the extent of such payment from any further liability to such depositor under this Agreement and the Receiver agrees to indemnify and hold the Assuming Bank harmless from any claims of, or liabilities to, such depositors, including, without limitation, any claims arising out of the refusal of the Assuming Bank to honor any checks or other instruments drawn on any of the accounts of such depositors to the extent transferred to the Receiver.

#### **SECTION 12. NOTICES TO DEPOSITORS AND CREDITORS.**

The Assuming Bank agrees and is hereby authorized, for and on behalf of the Receiver, to give notice to former depositors of the Bank of its assumption of the deposit balances of the Bank assumed by the Assuming Bank. Such notice shall be given to domestic depositors

within 30 days after the Bank Closing substantially in the form and manner required by Part 307 of the Corporation's regulations (12 C.F.R. Part 307 (1974)).

### SECTION 13. RECORDS.

#### 13.1 *Delivery to Assuming Bank of Liability and Other Documents.*

The Receiver hereby delivers to the Assuming Bank the following records pertaining to the deposit and other liabilities assumed, or to the business of the Bank to be conducted, by the Assuming Bank pursuant to this Agreement:

(a) Signature cards, orders and contracts between the Bank and its depositors, and all records of similar character.

(b) Depositors' passbooks held by the Receiver, deposit slips and cancelled checks or withdrawal orders representing charges to depositors' accounts.

(c) Any other files, documents, instruments, accounts and records relating to the liabilities, and other obligations, assumed or undertaken by the Assuming Bank.

(d) Any files, documents, instruments, accounts and records and all other property held by the Bank for the account of others relating to the Bank's trust (if any) and other business to be conducted by the Assuming Bank.

#### 13.2 *Delivery to Assuming Bank of Asset Documents.*

The Receiver hereby delivers to the Assuming Bank the following records, instruments, documents and agreements of the Bank pertaining to the Available Assets, the assets purchased by the Assuming Bank pursuant to subsection 3.2 hereof, letters of credit described in subsection 2.3 hereof and the Bank's leases. Upon the rejection of Available Assets, the Assuming Bank's election to reassign to the Receiver the account party obligations on letters of credit pursuant to subsection 2.3 hereof, or the Assuming Bank's election not to take an assignment of or sublease under any lease or to execute a new lease with respect to any leased property, the Assuming Bank will promptly return all



records, instruments, documents and agreements relating to such Available Asset, account party obligation or lease to the Receiver:

(a) Records of deposit balances carried with other banks, bankers and trust companies.

(b) Deeds, mortgages, leases, abstracts, title insurance policies and reports, surveys and other instruments or records of title.

(c) Notes, securities, agreements, deeds of trust, mortgages, loan agreements, collateral of all kinds and all other related documents and instruments.

(d) All bonds and other evidences of obligations and securities.

(e) All other related files, documents, instruments, accounts and records (including information received by the Assuming Bank following the Bank Closing).

### **13.3 *Securities and Property Held by Nominee Partnerships.***

It is understood that the Bank has caused certain securities and certain other property held by it for its own account or for the account of third parties to be registered in the name of, or held by, certain nominee partnerships and that agreements have been entered into between the Bank and such partnerships with respect thereto. The Receiver shall, at the request of the Assuming Bank, exercise the rights of the Bank under such agreements, including its powers as agent and attorney in fact for such partnerships, and take such other action as shall be necessary to assign, endorse, transfer and deliver, or otherwise to deal with, all securities and other property which the Assuming Bank shall have purchased, or which relate to the Bank's trust and other business to be conducted by the Assuming Bank hereunder, registered in the name of, or held by, such partnerships.

## **SECTION 14. ACCESS TO PROPERTIES AND RECORDS.**

### **14.1 *Receiver's and Corporation's Rights of Access.***

The Assuming Bank agrees at its expense to preserve and safely keep all of the files, documents, instruments, books of account, records and other similar papers transferred to it under this Agreement, or which may from time to time come into its possession as a result of this



Agreement, for the joint benefit of itself, the Receiver and the Corporation, to deliver to the Receiver and the Corporation such files, documents, instruments, books of account, records and other similar papers which may be in its possession but which relate to assets and liabilities not purchased, assumed or otherwise transferred under this Agreement and to permit the Receiver, the Corporation and the Comptroller of the Currency, or their designated representatives, at any reasonable time to inspect and make extracts from, or copies of, any of such files, documents, instruments, books of account, records and other similar papers which are transferred to it as a result of this Agreement. The Assuming Bank will permit the Receiver, the Corporation and the Comptroller of the Currency, and their designated representatives, to consult, as provided in subsection 10.2 hereof, with the Assuming Bank's officers and employees and at any reasonable time to inspect and inventory the properties, assets and rights described in this Agreement.

**14.2 *Removal of Assets and Evidence of Liabilities not Purchased, Selected or Assumed.***

The Assuming Bank, as provided for in this Agreement, will also preserve and maintain for the benefit of the Receiver and the Corporation and will permit the Receiver or the Corporation at their discretion, or upon the request of the Assuming Bank, to remove all of the Bank's assets or evidences thereof and all evidences of liabilities not purchased by, or otherwise transferred to, or assumed by, the Assuming Bank under this Agreement, which are located in or upon any of the properties occupied by the Assuming Bank.

**14.3 *Disposal of Records.***

The Assuming Bank may, with the prior written consent of the Receiver, dispose of any of the records of the Bank transferred to the Assuming Bank. If such consent is not given, the Assuming Bank may deliver such records to the Receiver.

**14.4 *Assuming Bank's Right to Access.***

The Receiver agrees to preserve and safely keep all of the books of account and corporate records of the Bank, and, to the extent permitted by law, shall allow the Assuming Bank, or its designated repre-

sentatives, to inspect and make extracts from or copies of any such books of account and corporate records wherever located, at any reasonable time.

#### **SECTION 15. FURTHER ASSURANCES.**

The Receiver and the Assuming Bank agree at any time and from time to time upon request of either to execute and deliver such endorsements of instruments, assignments, deeds, notices of assignment, financing statements, releases, waivers, consents, termination statements, satisfactions, bond or stock powers and further instruments and documents of conveyance, release, satisfaction, waiver or consent and to join or participate in any petition, accounting, or judicial or regulatory proceeding as shall be necessary or proper to carry out the intent of this Agreement. The Receiver further agrees to use its best efforts to cause others (including, without limitation, the FRB and subsidiaries of the Bank) to execute and deliver such instruments and documents.

#### **SECTION 16. REPRESENTATIONS, WARRANTIES AND COVENANTS OF THE ASSUMING BANK.**

The Assuming Bank represents and warrants to, and covenants with, the Receiver as follows:

##### **16.1 *Good Standing of Assuming Bank.***

The Assuming Bank is a bank duly organized and validly existing and in good standing under the laws of the jurisdiction of its incorporation, has corporate power to carry on its business as such and is duly authorized to do a banking business in the State of New York.

##### **16.2 *Legal Powers of Assuming Bank.***

The Assuming Bank has the legal power to enter into and perform this Agreement and the Indemnity Agreement between the Corporation and the Assuming Bank of even date herewith (the "Indemnity Agreement"), and the consummation of the transactions contemplated by this Agreement and the Indemnity Agreement will not violate any provision of law or of its Organization Certificate or by-laws, or result in the breach of any provision of, or constitute a default

under, any indenture, agreement or other instrument to which the Assuming Bank is a party, or to which it or any of its properties may be subject, and this Agreement and the Indemnity Agreement constitute the valid and binding obligations of the Assuming Bank and are enforceable in accordance with their respective terms.

**16.3 *Assuming Bank's Board Action.***

The Assuming Bank's Board of Directors has taken all action necessary for the Assuming Bank to enter into this Agreement and the Indemnity Agreement, and to seek all federal and state regulatory approvals required in order for the Assuming Bank to conduct the banking business at the branch and office locations of the Bank as contemplated by this Agreement. Immediately following the execution of this Agreement, the Assuming Bank shall apply for all such regulatory approvals.

**SECTION 17. REPRESENTATIONS AND WARRANTIES OF  
THE RECEIVER.**

The Receiver represents and warrants to, and covenants with, the Assuming Bank as follows:

**17.1 *Power and Authority.***

The Receiver has the legal power and right to enter into and perform this Agreement and the transactions contemplated hereby and the consummation of the transactions contemplated by this Agreement will not violate any provision of law and this Agreement constitutes the valid and binding obligation of the Receiver and is enforceable in accordance with its terms.

**17.2 *Corporation's Board Action.***

The Board of Directors of the Corporation has taken all action necessary for the Receiver to enter into this Agreement.

**17.3 *Warranties as to Assets.***

The Receiver warrants that the assets sold to the Assuming Bank under subsection 3.2 hereof (other than assets listed on Schedule F), all collateral securing such assets and the mortgages and other pledge

or security agreements under which such collateral is held, and all securities selected by the Assuming Bank under subsection 3.3(a) of this Agreement, are legal, genuine and valid, and that all such assets and collateral have been sold and transferred to the Assuming Bank free of all liens, charges and other encumbrances, except that certain of the securities may be subject to pledges (directly or indirectly) made by the Bank as security for public deposits or for the faithful performance of the trust department of the Bank or be subject to repurchase agreements, and with respect to such collateral, except those permitted under the relevant security agreement, none of which secure obligations of or have been created by the Bank or the Receiver. As to all other assets (except the Real Estate, Personalty and leasehold improvements) sold to the Assuming Bank under this Agreement, Receiver warrants that they will be sold and transferred free of all liens, charges and other encumbrances placed on such assets by the Bank prior to the Bank Closing and as to which the Assuming Bank had no notice (including constructive notice by filing or recording or other public notice given in accordance with applicable law). Except as set forth above, all assets sold to the Assuming Bank hereunder are otherwise so sold and transferred without recourse and without any warranties whatsoever as to their legality, enforceability, genuineness, collectibility, documentation or freedom from liens, in whole or in part, or otherwise, it being the intention of the parties hereto that, for all purposes of this Agreement, the Assuming Bank's opportunity to select only those assets of the Bank which it so chooses and the method of valuation used pursuant to this Agreement shall be deemed sufficient protection to the Assuming Bank and shall constitute the agreed and accepted values of such assets, subject to adjustment only as provided in this Agreement. Settlement for breach of representations and warranties by the Receiver under this subsection 17.3 shall be by substitution of other assets for the assets as to which there is such a breach as provided in subsection 20.2 hereof.

#### **17.4 Foreign Assets.**

In the event that any assets selected or purchased by the Assuming Bank are made subject to, or are affected by, any court order or process, liquidation, winding up, execution, attachment or lien outside the United States, which is not dismissed or removed within 15 days of the occurrence thereof, the Receiver will post such bond or put up such security

or take such other measures as shall insure to the Assuming Bank the release of such assets, and all income paid or accrued thereon, from such order or process, liquidation, winding up, execution, attachment or lien within 45 days from the occurrence thereof.

**17.5 *Survival of Representations and Warranties.***

The representations, warranties and covenants contained in this Section 17 survive the execution of this Agreement but expire two years after the Bank Closing.

**SECTION 18. CONDITIONS TO AGREEMENT.**

This Agreement shall not have any effect until all of the following conditions have been met:

**18.1 *Opinion of Counsel for Assuming Bank.***

The Receiver shall have received the favorable written opinion, dated the date of this Agreement, of counsel for the Assuming Bank, substantially to the following effect:

(a) The Assuming Bank is a bank duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, has corporate power to carry on its business as such and is duly authorized to do a banking business in the State of New York.

(b) All corporate action necessary to authorize the transactions hereunder and the execution and delivery by the Assuming Bank of other instruments and documents as contemplated hereby has been taken.

(c) This Agreement and the Indemnity Agreement have been duly authorized, executed and delivered by the Assuming Bank and constitute the valid and binding obligations of the Assuming Bank enforceable in accordance with their respective terms.

(d) The consummation of the transactions contemplated by this Agreement and the Indemnity Agreement will not violate any provision of law known to such counsel or of the Organization Certificate or by-laws of the Assuming Bank or result in the breach of any provision of, or constitute a default under, any



indenture, agreement or other instrument known to such counsel to which the Assuming Bank is a party.

Such opinion shall cover such other matters incidental to the transactions contemplated hereby as the Receiver may reasonably request and may have such qualifications and limitations in respect of the breadth of the foregoing as may be acceptable to the General Counsel of the Corporation.

**18.2 *Accuracy of Representations.***

The representations and warranties made by the parties shall be true and accurate in all material respects as of the date of this Agreement.

**18.3 *Regulatory Approvals.***

The responsible federal and state agency or agencies shall have approved consummation of the transactions contemplated by this Agreement, including approvals pursuant to 12 U.S.C. § 1828(e).

**18.4 *Court Approvals.***

The Receiver shall have received all necessary court approvals, as required by 12 U.S.C. § 192, of the transactions contemplated by this Agreement, and shall have presented to the Assuming Bank evidence of such approvals, satisfactory in form and substance to counsel for the Assuming Bank.

**18.5 *Opinion of Corporation Counsel.***

The Assuming Bank shall have received the favorable written opinion, dated the date of this Agreement, of the General Counsel of the Corporation, substantially to the following effect:

(a) The Receiver has the legal power and right to enter into and perform this Agreement and the transactions contemplated hereby, and has taken all necessary corporate proceedings to authorize the transactions contemplated by this Agreement, the performance by the Receiver of its obligations hereunder and the execution and delivery by the Receiver of all instruments and other documents contemplated hereby.



(b) This Agreement has been duly authorized, executed and delivered by the Receiver and constitutes the valid and binding obligation of the Receiver enforceable in accordance with its terms.

(c) The Corporation has the legal power and right to enter into and perform the Indemnity Agreement and the transactions contemplated thereby, and has taken all necessary corporate proceedings to authorize the transactions contemplated by the Indemnity Agreement, the performance by the Corporation of its obligations thereunder and the execution and delivery by the Corporation of all instruments and other documents contemplated thereby.

(d) The Indemnity Agreement has been duly authorized, executed and delivered by the Corporation and constitutes the valid and binding obligation of the Corporation enforceable in accordance with its terms.

Such opinion shall cover such other matters incidental to the transactions contemplated hereby as the Assuming Bank may reasonably request.

*18.6 Opinion of Counsel to the Comptroller.*

The Assuming Bank shall have received the favorable written opinion, dated the date of this Agreement, of the Chief Counsel of the Comptroller of the Currency, to the following effect:

(a) The Comptroller of the Currency has closed the Bank pursuant to the provisions of 12 U.S.C. § 191 and all necessary determinations have been made by the Comptroller of the Currency in connection therewith.

(b) The Corporation has been duly and regularly appointed receiver of the Bank pursuant to the provisions of 12 U.S.C. § 191 and 12 U.S.C. § 1821(c).

*18.7 Corporation Documents.*

The Assuming Bank shall have received certified copies of the following:

(a) The order of the Comptroller of the Currency closing the Bank pursuant to the provisions of 12 U.S.C. § 191 and appointing

the Corporation as receiver pursuant to the provisions of 12 U.S.C. § 191 and 12 U.S.C. § 1821(c).

(b) The corporate resolutions of the Corporation authorizing the Receiver to execute and deliver this Agreement and the Corporation to execute the Indemnity Agreement.

#### 18.8 *Assuming Bank Documents.*

The Receiver shall have received certified copies of the following:

(a) The corporate resolutions of the Assuming Bank authorizing the Assuming Bank to execute and deliver this Agreement and the Indemnity Agreement.

(b) Incumbency certificates covering the officers of the Assuming Bank authorized to execute this Agreement and the Indemnity Agreement on behalf of the Assuming Bank.

(c) Written confirmation from the Assuming Bank that the corporate authorizations referred to in subsection 16.3 hereof have not been rescinded or amended.

#### 18.9 *Bid Form.*

All of the conditions set forth in the bid form delivered to the Receiver, in which the Assuming Bank offers to purchase assets and assume liabilities of the Bank, shall have been met.

#### 18.10 *Capital Note.*

The Corporation shall have purchased or the Assuming Bank shall be satisfied that the Corporation will purchase the subordinated capital note or notes of the Assuming Bank or the non-subordinated capital note or notes of any holding company incorporated in the United States which owns substantially all of the Assuming Bank's outstanding voting securities (herein called the "Capital Note"). The Capital Note shall be payable to the order of the Corporation.

#### 18.11 *Indemnity Agreement.*

The Corporation shall have entered into the Indemnity Agreement with the Assuming Bank in form and substance satisfactory to the Assuming Bank and its counsel.

**18.12 Release of FRB Security Interest.**

The Assuming Bank shall have received a duplicate original copy of a letter addressed to the Corporation from the FRB, in form and substance satisfactory to the Assuming Bank and its counsel, with respect to the release of the FRB Security Interest in all assets acquired or to be acquired by the Assuming Bank pursuant to this Agreement and as to the approximate amount of the FRB Indebtedness as of the Bank Closing.

**SECTION 19. PAYMENT OF PREMIUM.**

As consideration for the transfer of the assets and the business purchased hereunder, the Assuming Bank agrees to pay a premium equal to the difference between the liabilities assumed pursuant to subsection 2.1 hereof and the aggregate values and purchase prices of the assets purchased pursuant to subsections 3.2 and 3.3 and Section 4 hereof, as determined under the applicable provisions of this Agreement. The amount of this premium is \$125,000,000 and it shall be paid as set forth in subsection 3.3 hereof.

**SECTION 20. ADJUSTMENTS.**

**20.1 Adjustments from New Schedules.**

All computations necessary for calculating the Additional Asset Value shall be based upon the liabilities set forth in Schedule B and the assets set forth in Schedules C, D, E and F. It is understood, however, that these Schedules and Schedules A and G are as of dates other than the Bank Closing and that certain of the figures set forth in such Schedules may be as of different dates. It is further understood that the descriptions and Schedules of liabilities and assets transferred to and assumed by the Assuming Bank may not be complete because of the lack of full information concerning the Bank's operations, and that certain liabilities and assets of a nature similar to those set forth in such Schedules have not been included therein because they were carried in the Bank's suspense or miscellaneous accounts at the Bank Closing. The Receiver, within 30 days after the Bank Closing or as soon thereafter as possible, shall prepare new Schedules as of the Bank Closing of liabilities actually assumed under subsection 2.1 hereof, assets purchased under subsection 3.2 hereof, the Available Assets and, subject to

the provisions of subsection 2.3(c) hereof, letters of credit assumed under subsection 2.3 hereof. Such new Schedules shall be prepared in accordance with the accounting standards and policies employed by the Comptroller of the Currency in the Instructions for the Preparation of Reports of Condition by National Banking Associations in effect on the Call Date immediately preceding the Bank Closing. Such new Schedules shall include such additional liabilities and assets which are of a nature similar to those set forth in the applicable Schedules and which were, at the Bank Closing or as of the date such Schedules were prepared, carried in the Bank's suspense or miscellaneous accounts or not posted by the Bank. Such new Schedules shall also include accruals as of the Bank Closing for all income and expenses related to assets and operations of the Bank acquired by the Assuming Bank under this Agreement and all normal and recurring operating expenses (other than Federal, state and local income tax accruals) and expenses related to liabilities assumed by the Assuming Bank under this Agreement, whether or not the Bank reflected such accruals on its books in the normal course of its operations. Such new Schedules shall be prepared on the basis of the best information then available to the Receiver. In the event that any of the new Schedules prepared by the Receiver are unsatisfactory to the Assuming Bank, such Schedules shall be reviewed by independent certified public accountants satisfactory to the Receiver and the Assuming Bank to ascertain whether the items shown on such new Schedules are in compliance with this Agreement and are in accordance with the accounting standards and policies employed by the Comptroller of the Currency in the Instructions for the Preparation of Reports of Condition by National Banking Associations in effect on the Call Date immediately preceding the Bank Closing or whether the amounts shown on such new Schedules are in accordance with generally accepted accounting principles in the United States in effect on the Bank Closing, as the case may be. The opinion of such independent certified public accountants with respect to the items and amounts shown on such new Schedules shall be final. Following review of such Schedules by the independent certified public accountants, new Schedules reflecting the results of the review shall be prepared. The Assuming Bank shall pay the fees and costs of such accountants. The parties agree that within ten days of the preparation of such new Schedules, the Additional Asset Value shall be adjusted to reflect differences on account of trans-

actions up to the date the Additional Asset Value is adjusted. The books and records of the Bank as of the Bank Closing shall be adjusted to reflect all adjustments to the Schedules and all new Schedules as of the Bank Closing provided for in this Agreement.

**20.2 *Adjustments for Errors or Omissions.***

In the event any omission or error in the attached Schedules shall be discovered in compiling the new Schedules required by this Section 20 or in completing the transfers and assumptions contemplated by this Agreement, the parties severally agree to adjust therefor by an adjustment to the amount of the Additional Asset Value and to the books and records of the Bank as of the Bank Closing if appropriate, it being the intention of the parties that the assets to be transferred pursuant to subsections 3.2 and 3.3 and Section 4 hereof, valued as set forth therein, plus the premium described in Section 19 hereof, shall equal the liabilities assumed pursuant to subsection 2.1 hereof, valued as set forth therein. Any omission or error discovered after, or any breach of any representation or warranty set forth in subsection 17.3 hereof and discovered after, 180 days from the Bank Closing (or earlier reduction in the Additional Asset Value to zero) and up to two years after the Bank Closing shall be settled, to the extent practicable, (i) by the transfer to the Assuming Bank or retransfer to the Receiver, as the case may be, and without recourse or warranty, of assets then held by the Receiver and the Assuming Bank, respectively, at fair market value (to be determined by an appraiser jointly designated by the Receiver and the Assuming Bank) for assets transferred to the Assuming Bank and at the values specified in this Agreement for assets of the type involved for assets retransferred to the Receiver, the Assuming Bank to make the selection of such assets, with any minor (\$25,000 or less) difference between the adjustment required and the assets transferred or retransferred being settled in cash or (ii) in cash if the assets of the Bank then held by the Receiver or the Assuming Bank, as the case may be, are insufficient to settle the amount of such omissions or error or the obligations of the Receiver resulting from the breach of a representation or warranty set forth in subsection 17.3 hereof. No adjustment of the Schedules or the books and records of the Bank and no settlement under this Agreement shall be made for any error or omission discovered more than two years after the Bank Closing.

### 20.3 *Unlawful Deposit Liabilities.*

If it is discovered subsequent to the date hereof that any portion of the deposit liabilities assumed by the Assuming Bank constitute funds the depositor obtained from the Bank as a result of an unauthorized or unlawful transaction as determined by the Receiver, the Assuming Bank shall pay to the Receiver, upon its demand, any such funds then on deposit, and the Assuming Bank shall be discharged from further liability to such depositor under this Agreement and shall be indemnified and held harmless by the Receiver, to the extent of the payment so made to the Receiver, from such liability.

### 20.4 *Limitation on Adjustments to Liabilities Assumed.*

To the extent that the adjustments called for by the provisions of this Agreement, including adjustments reflected in new Schedules prepared pursuant to subsection 20.1 hereof or for errors or omissions pursuant to subsection 20.2 hereof, shall within 180 days after the Bank Closing increase the value of the liabilities assumed hereunder by the Assuming Bank pursuant to Section 2 hereof in an aggregate amount in excess of five percent of the total liabilities of the Bank (other than the FRB Indebtedness) as reflected in the trial balance of the Bank as of the close of business on the second banking business day preceding the day of the Bank Closing heretofore delivered by the Receiver to the Assuming Bank, the Receiver, upon the making of such adjustment, shall pay to the Assuming Bank an amount in cash equal to such excess, and such excess shall not result in an increase in the Additional Asset Value.

## SECTION 21. SETTLEMENT OF CLAIMS.

The Receiver or the Corporation shall have the right, at its option, to defend or settle any claim or suit against the Assuming Bank which may result in a loss to the Receiver or the Corporation, if such claim or suit is subject to the Indemnity Agreement or any indemnity obligation contained in this Agreement, and arises out of this Agreement or existed against the Bank on or before the Bank Closing. The Assuming Bank shall have no duty to defend or take any action with respect to any such claim or suit, but the Assuming Bank shall cooperate in the defense of such claim or suit to the extent reasonably required by the Receiver or the Corporation.



**SECTION 22. RESCISSION.**

If an injunction or other court order is issued or there is an attachment, security interest, lien (other than the FRB Security Interest) or transfer covering a substantial part of the assets of the Bank which has not been discharged, vacated or rescinded, and in the reasonable judgment of the Assuming Bank such injunction or other court order, or attachment, security interest, lien, or transfer substantially interferes with the purchase or selection and transfer of assets of the Bank to the Assuming Bank as contemplated by this Agreement, then this Agreement shall be rescinded and the parties restored to their positions prior to the Bank Closing, unless the Receiver is able to transfer other assets which, in the reasonable judgment of the Assuming Bank, are substantially equivalent in value without such impediment. In the event of rescission, all liabilities assumed by and all assets transferred to the Assuming Bank shall become liabilities and assets of the Receiver as of the Bank Closing.

**SECTION 23. MISCELLANEOUS.****23.1 Schedules.**

All Schedules herein referred to shall constitute a part of this Agreement.

**23.2 Counterparts.**

This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument, and any party hereto may execute this Agreement by signing any such counterpart.

**23.3 Successors; No Third Party Rights.**

All covenants, representations, warranties and conditions of this Agreement shall be binding on the successors and assigns of the Assuming Bank and the Receiver. Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the Assuming Bank, the Receiver and the Corporation any legal or equitable right, remedy or claim under or in respect of this Agreement, or any provision herein contained, it being the intention of the parties hereto that this Agreement, the assumption of obligations and statements of responsibilities hereunder and all other conditions

and provisions hereof are for the sole and exclusive benefit of such parties and for the benefit of no other person.

#### **23.4 Headings.**

The headings of the Sections and subsections contained in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provision hereof.

#### **23.5 Notices.**

Any notice, request, demand or other communication to either of the parties hereto, or to the Corporation, shall be deemed given when received and shall be given in writing, and delivered against receipt therefor, or sent by certified mail, postage prepaid, to such party at its address set forth below or at such other address as such party shall hereafter furnish in writing.

**Receiver**

**FEDERAL DEPOSIT INSURANCE  
CORPORATION**  
550 17th Street N.W.  
Washington, D.C. 20429

Attention: Chief, Division of  
Liquidation

**Assuming Bank**

**EUROPEAN-AMERICAN BANK  
& TRUST COMPANY**  
10 Hanover Square  
New York, New York 10005

Attention: President

**Corporation**

**FEDERAL DEPOSIT INSURANCE  
CORPORATION**  
550 17th Street N.W.  
Washington, D.C. 20429

Attention: Office of the Chairman

#### **23.6 Fees of Appraisers and Title Company Charges.**

All fees of Appraisers for appraisals provided for in this Agreement shall be borne one half by the Assuming Bank and one half by the Receiver. All charges of the Title Company, including fees for title insurance, with respect to the Real Estate and leasehold improvements purchased by the Assuming Bank shall be paid by the Assuming Bank and all charges of the Title Company with respect to the Real Estate

and leasehold improvements not purchased by the Assuming Bank shall be borne one half by the Assuming Bank and one half by the Receiver.

**23.7 Governing Law.**

This Agreement and the rights and obligations hereunder shall be governed by the law of the State of New York to the extent that Federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party hereto.

**23.8 Continuing Cooperation.**

The purposes of this Agreement and the transactions provided for herein are to provide a means by which depositors and other creditors of the Bank may be protected against losses, the convenience and needs of the various communities in which the Bank's offices are located may be served, the Assuming Bank may receive the benefits and assume the risks contracted for and the risk of loss to the Corporation may be reduced. Although the Assuming Bank is expected to incur certain business risks with respect to the assets purchased by it hereunder and with respect to the operations of the Bank conducted by it after the Bank Closing, it is intended that the purposes of this Agreement be accomplished without imposing an unreasonable financial burden on the Assuming Bank. The parties therefore agree that they shall in good faith, and with their best efforts, cooperate with one another to carry out the purposes of this Agreement as herein described.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the time, day and year first above written.

FEDERAL DEPOSIT INSURANCE CORPORATION,  
AS RECEIVER OF FRANKLIN NATIONAL BANK

By GEORGE W. HILL  
Title: *Chief, Division of  
Liquidation*

EUROPEAN-AMERICAN BANK & TRUST  
COMPANY

By H. E. EKBLOM  
Title: *Chairman*

STUART W. MARSH  
Title: *Assistant Secretary*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
FEDERAL DEPOSIT INSURANCE CORPORATION,  
as Receiver of Franklin National Bank, : (O.G.J.)  
File No. 75 C. 276  
Plaintiff, :

-against- : NOTICE OF APPEAL

JEAN M. GRELLA, LAWRENCE LEVER, and :  
LEVER HOLDING CORP., :  
Defendants. :

-----X

NOTICE IS HEREBY GIVEN that JEAN M. GRELLA, a defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment declaring the defendant's ground lease to Franklin National Bank to be in full force and effect, and granting plaintiff a permanent injunction restraining the defendant from pursuing her rights under the said lease, entered in this action on the 6th day of July, 1976, and from each and every part thereof.

Dated: Mineola, New York  
August 31, 1976

SPRAGUE, DWYER, ASPLAND & TOBIN, P

By: James T. McIligan  
A Member of the Firm

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212-943-6500

Wolff & Diamond, Esqs.  
Attorneys for Defendants  
Lawrence Lever & Lever Holding  
Corp.  
100 Garden City Plaza  
Garden City, New York 11530

Service of three ③ copies of the within  
is admitted this 15<sup>th</sup> day of October 1976

Attorney for Plaintiff - Appellee

2 copies received on 10/15/74

Hughes Hubbard v Reed  
Attorney for Plaintiff - Appellee  
JLT